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By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

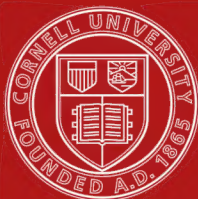
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THE LIBERTY OF THE PRESS,
SPEECH, AND PUBLIC WORSHIP.

BEING

Commentaries on the Liberty of the Subject

AND THE

Laws of England.



THE LIBERTY OF THE PRESS, SPEECH, AND PUBLIC WORSHIP.

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Commentaries on the Liberty of the Subject

AND THE

Laws of England.

BY

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BARRISTER-AT-LAW,

SOMETIME COMMISSIONER OF ENGLISH AND IRISH FISHERIES.

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PREFACE.

THE introduction to these Commentaries contained a classification of the law under ten divisions, one of which was entitled "The Security of Public Worship," and another was entitled "The Security of Thought, Speech, and Character." It was also pointed out¹ that these two divisions might well be treated as substantially one, seeing that the Security of Public Worship was only another name for the Security of Thought and Speech, when applied to one prominent subject-matter. But, nevertheless, it was deemed advisable to treat them as separate divisions, and even to give precedence to that which was specific, over that which was generic. The reason was, that in all countries, ages, and conditions of mankind—even in the savage state—something has always been recognised as Public Religious Worship, which, moreover, has always been a settled and conspicuous practice; whereas, until the invention of printing, the Freedom of Thought and Speech was scarcely dreamt of as a branch of human government, and the minds of legislators had been almost blank with regard to it. Moreover, the degree of toleration accorded in the one case seemed to differ from that accorded in the other, and at least, both

¹ 1 Pat. Com. (Pers.) 66.

rights have seldom been treated as based on the same fundamental principle. The one had an unknown beginning, and has descended to us incumbered with incidents and involved in details now difficult to reconcile and harmonize; while the other sprang four centuries ago out of chaos, and has more of the simplicity of all modern creations. But now that the convenience of this publication admits of both divisions being treated in one volume, the more scientific classification has been adopted; and while the security of Thought and Speech is the generic right, the Security of Public Worship is here treated as holding the second place, being only one of its species.

While the minds of governors before the invention of printing were blank as to the Security of Thought and Speech, it was otherwise with the Security of Public Worship. With regard to this there was no blank, but on the contrary, there was in its place an active and virulent maxim at work. This maxim led all governments to take up a false position, which, after a long series of uncandid confessions and ill-disguised retreats, has at length been all but finally abandoned. This was the maxim, that there was only one true form of religious worship,¹ that each governor had already discovered it,

¹ "I would only ask why the civil state should be purged and restored by good and wholesome laws made every third or fourth year in Parliament assembled, devising remedies as fast as time breedeth mischief, and contrariwise, the ecclesiastical state should still continue upon the dregs of time and receive no alteration now for these five-and-forty years and more. . . I for my part do confess, that, in revolving the Scriptures, I could never find any such thing as that there should be but one form of discipline in all Churches; but that God had left the like liberty to the Church government as he had done to the civil government, to be varied according to time, and place, and accidents, which nevertheless his

that he was its only prophet, and that as such he felt bound to torture, or in some way to punish the body of any citizen who was suspected to entertain, even in his secret thoughts, the slightest hesitation about believing and obeying.¹ The cries and groans of the victims of this treatment ascended to Heaven, and in due time drew down a deliverance at first tardy and only half understood. The chafing of a monk in his solitary cell against first one and then another of the sore points of so arbitrary a regimen, created sympathy and gave voice and body to the general misgivings, and finally led to the Reformation. This grand rebellion of the human intellect against the arrogance of all existing governments in their dealings with the mind and conscience, cleared the air of malignant vapours, and revealed glimpses of a more natural way of regulating the highest functions of man in the social state. And yet so deeply had this accepted maxim of government become engrained in the heart and soul of every governor, that when one tyranny was overthrown, the successor became infected with the same vice as his predecessor. They differed only in this, that the relations of victim and oppressor were sometimes reversed, and it took many generations to unlearn those arts of habitual intolerance which clogged the machinery of legislation.

The art of government nevertheless took a new starting point from the era of the Reformation, or rather, from the time when the smoke and tumult of that upheaving

high and divine Providence doth order and dispose."—*Bacon, Pacif. Ch.*

¹ Philosophers have counted fifty-five distinct sects between the year 264 and 1843, each professing to teach the true doctrine of Christianity, and all with some modifications.—*Wikoff, Civiliz.*

cleared away.¹ The great thinkers of the world soon taught Kings, Parliaments, Cabinets, Statesmen one by one, and each with gradually abating reluctance, to renounce, and even to reverse, the first principles they had imbibed on taking up their traditionary power. The lingering echoes of these exploded fallacies have, it is true, been heard now and then, even too recently. But we have reached an epoch when the dogmas once gravely avowed and acted upon by the oracles of government, and sometimes also of the law, as living maxims, have become the scoff of schoolboys.

It never occurred to any government prior to the Reformation, and probably for a century or two later, that it was possible that the best form of religious worship, as well as the best form of human government (of which the former is merely a branch), might have been intended by Providence to be discovered by the scrutiny of Reason, each nation following the best guides of the time, yet following without blindly bowing the knee.² The dignity of thought

¹ "The Reformation was a great undertaking for the enfranchisement of human thought, and to call things by their proper names, a rebellion of the human understanding against power in spiritual matters."—*Guizot, Civ. Eur.* c. 12. "But while labouring for the destruction of absolute power in spiritual matters, the religious revolution of the sixteenth century was ignorant of the true principles of intellectual liberty. It neither knew nor respected all the rights of human thought; at the moment when it clamoured for them for its own liberty, it violated them with others. Still it caused religious doctrines to re-enter into general circulation and re-opened the field of faith to believers, and banished religion from politics. At the very moment that religion re-entered, so to speak, into the possession of the faithful, it parted from the government of society."—*Ibid.*

² "For my part I am certain that God hath given us our reason to discover between truth and falsehood, and he that makes not this use of it, but believes things he knows not why, I say it is by chance that he believes the truth, and not by choice, and

and speech is at last vindicated by showing how small a part of it can be really made subject to the control of any government or any laws. The old Philosopher taught, that every man has it in his power to prepare an impregnable rampart for his own thoughts.¹ Dissent, after having long been an unquestionable crime, has ended by becoming almost a corner-stone of the glory of civilisation. The art of agreeing to differ seems at last to have been all but mastered. The members of an Established Church are now contented to take their proper place in the social contract, and view with equanimity large numbers of their fellow men who, having "the same faculties, organs, dimensions, senses, affections, passions," insist on thinking

I cannot but fear that God will not accept this sacrifice of fools."—*Chillingworth Relig. Prot.* 133. "Religion is not believed because the laws have established it, but it is established because the leading part of the community have previously believed it to be true."—*Burke, Tracts Pop.* "Shall we say that of so many paths, pursued by so many contending sects, there is one, and only one, which is trodden by the honest, the candid, and the upright, and that all that deviate from that one path are the victims of their own levity, or prejudice, or insincerity?"—2 *Stephen, Eccl. Biog.* 467. BISHOP BURNET said he had long looked on liberty of conscience as one of the rights of human nature antecedent to society, which no man could give up, because it was not in his own power.—2 *Burnet, Hist. Own Times*, 216. BISHOP WARBURTON said, "My opinion is, and ever was, that the state has nothing to do with errors in religion, nor the least right so much as to attempt to repress them."—2 *Chatham Corresp.* 184.

¹ *Diog. Antisth.* "The conscience of man is eternal, invisible, and not in the power of the greatest monarch, in any limits to be straightened, in any bounds to be contained, nor with any policy of man, if once decayed, to be again raised. Neither Jew nor Turk required more than the submission to the outward observance and a convenient silence."—1 *Parl. Hist.* 763. "I may safely say there are scarcely three considering men who are in their opinions throughout of the same mind."—6 *Locke's Wks.* 372.

out their own best thoughts, on every subject touching their life, property and reputation, as well as touching their relations to their Maker. The synods of Christendom no longer burn to stifle inquiry. To echo and adopt the thoughts of others, who had no better materials of judging than their successors, and certainly had shorter experience to guide them, is less and less an accepted office of the modern teacher.¹

All these considerations only show, that the law relating to the security of Public Worship has now become settled (in this country at least) on principles as nearly as possible the reverse of those once accepted by all the governments of the world. No branches of the law have undergone so many important and yet late bestowed changes as those relating to Freedom of Speech and of Worship, which form the subject of this volume.

According to the method of treatment illustrated and explained in the former part of these Commentaries, the present volume exhibits those two great divisions of the law where the freedom of thought, of speculation, of social and political activity, essential to a self-governing community, may be said chiefly to reside, and where the highest functions of civilised beings are best displayed at work in daily life. It will be seen how few are the restrictions now found necessary to regulate the free play

¹ LUTHER well said, that heretics must be vanquished by the pen, as the Fathers vanquished them, and not by fire. If to conquer heretics by fire were an art, the executioners would be the most learned doctors on the earth. There would be no more need of study, but the man who subdued his opponent by force would be entitled to burn him. Heresy was something spiritual that could not be cut out with steel, nor burned with fire, nor drowned with water.—*Geffcken's Ch. & State*, 305.

of all that the mind and tongue of man can find to do, so far, at least, as their united efforts tend materially to interfere with human occupations; for this protection against such interference has already been shown to be the beginning and end of the law.

The natural tendency to think and speak of others as well as of ourselves, and especially of those superior to ourselves, is best found developed in the primary right of public meetings, and of a free press, the only restrictions being such as are imposed in order to guard against blasphemy, immorality, sedition, breach of the privilege of Parliament, contempt of court, on the one hand, and against defamation, on the other hand.

Again, the same faculty of thought and speech will be found protected as a species of property called copyright, inherent in, and created by, the person who thinks and speaks and publishes; and as akin to copyright, the cognate rights of patent and trade mark will here find their most proper place.

Lastly, the faculty of Free Thought and Speech is equally found developed as the rights of conscience under the form of Public Worship. Those rights which once overshadowed and were interwoven with the whole machinery of government and covered nearly all human conduct, became centred in the Established Church, which at first was national, or embraced the whole population. This gave rise to a great number of detailed laws relating to the clergy, their duties, rights, and privileges towards the public, and as between themselves, and above all, their powers of compulsion over the laity, which in the earliest times were extreme and all-embracing, but which have in course of centuries dwindled down to something almost

nominal. The representatives of the clergy once formed a large portion of one branch of the legislature, and supplied the leading maxims of government to all countries, and were deemed so puissant as to form by themselves a rival power to Kings, Emperors, and Parliaments. The memory of this greatness still lingers in the familiar watchwords, "Church and State." But after centuries marked by voluminous details of protective legislation, the clergy now contentedly fill the place of one of the professions; and the laws once peculiar to them are all cut down merely to those restrictions, which that part of the laity under their care, sometimes, not unwillingly, enforce against them. The rest of the community under the description of Dissenters now enjoy similar and even greater rights and liberties, in nearly all respects, and as regards the modes of public worship of their own choice, except in so far as a few traces of priestly privilege are not yet wholly effaced. While the substantial rights, duties, and possessions of Dissenters, now, to a great extent, coincide with those of the Established Church, the laws peculiar to the former make up but a small chapter compared to the voluminous details of the latter. How the one chapter decreased by degrees, and how the other never required to grow owing to certain inherent powers of self-government, will be seen throughout the latter part of this volume. The objects and purposes of Churchmen and Dissenters are now, or ought to be, the same; their methods are not, and need not be entirely the same. The main differences are merely a history of the steps by which they arrived from opposite quarters at the same goal.

The Liberty of the Press and the Liberty of Public

Worship have now long been household words, and it stands confessed, that if Englishmen understand anything, they understand the general bearings of these two cardinal laws and know how to live under them. Yet they reached their settled state only after a long series of experiments. As popular cries they serve as a key to attune the thoughts. But popular cries are often misleading; and reasonable accuracy of knowledge is not attainable without attending to the details, qualifications, and intricate ramifications of the doctrines that make up the general result.¹ He who thinks he knows enough of the outlines to keep himself right, and to be a trusty counsellor to his neighbours in matters of great pith and moment, has often to recur to recondite principles, and draw many distinctions of detail once conspicuous but now forgotten. Of all the subjects that most closely touch the individual citizen and come home to his business and bosom, none can be compared to the Liberty of Speech both in public and private, and the Liberty of Worshipping in peace

¹ "The reason of the law is the life of the law, for though a man can tell the law, yet if he know not the reason thereof, he shall soon forget his superficial knowledge."—*Co. Litt.* 183b. "General laws are indeed very comprehensive, soon learned, and easily digested into method; but when they come to particular application, they are of little service, and leave a great latitude to partiality, interest and variety of apprehensions to misapply them; not unlike the common notions in the moralist, which, when both the contesting Grecian captains most perfectly agree, yet from them each deduced conclusions in the particular case in controversy suitable to their several desires and ends though extremely contradictory each to other. It hath therefore always been the wisdom and happiness of the English Government not to rest in generals, but to prevent arbitrariness and uncertainty by particular laws fitted almost to all particular occasions."—*Hale, C. J., Pref. Roll. Abr.*

according to his own conscience. All restrictions on these primary rights are vexatious and often futile, unless they are shown to be absolutely essential to enable each to attain the maximum of positive enjoyment with a minimum of risk and deprivation. All admit that the Press is the sentinel of the constitution, and, with its hundred eyes, promptly detects when the functions of self-government are not kept in their proper bearings, and in the highest state of efficiency. It is part of the people's prerogative, "broad and general as the casing air" which each citizen breathes, and Englishmen cannot contemplate in the distant future a period of time when this great organ, which thinks aloud for them all, shall be stifled.¹

The present volume, exhibiting in detail these two divisions of the law in which English liberty is nearly at its best, and has long acquired most of its renown, will set forth how far the law has been allowed to go in its restrictions, or rather, how far the law has been cut down in laying its impediments on Free Speech and Thought, and on a Free Press, and on the Freedom of Public Worship. It will show how far each individual is protected in his own personal enjoyment of those rights, and to what extent he can be punished for violating the equal rights of his neighbours. Everything of importance relating to Public Meetings, Sedition, Liberty of the Press,

¹ "To prevent men thinking and acting for themselves by restraints on the press is like the exploits of that gallant man who thought to pound up the crows by shutting his park gates."—*Milton's Arcop.* "If our boasted Liberty of the Press were to consist only in the liberty to write in the praise of the Constitution, this is a liberty enjoyed under many arbitrary governments."—*L. Stanhope, cited Ersk. Sp. (R. v Paine).*

Libel, Privilege of Parliament, Contempt of Court, Copyright and Patent right, the rights and duties as well as the position and property of the Clergy and of Dissenters, and their mutual Toleration is here treated; and the treatment of these subjects makes a group complete in itself.

J. P.

GOLDSMITH BUILDING, TEMPLE,
May, 1880.

CONCISE OUTLINE OF SUBJECTS.

DIVISION OF THE LAW RELATING TO THE SECURITY OF THOUGHT, SPEECH, AND CHARACTER.

CHAP.	PAGE
I. INTRODUCTION TO THIS DIVISION OF THE LAW . . .	1
II. FREEDOM OF PUBLIC MEETINGS, ADDRESSES, AND PETI- TIONS	19
III. FREEDOM OF THE PRESS, AND OF CORRESPONDENCE BY POST	38
IV. RESTRICTION ON THE PRESS AND SPEECH AS REGARDS BLASPHEMY AND IMMORALITY	61
V. ABUSE OF FREE SPEECH BY SEDITIOUS WORDS AND WRITINGS	73
VI. LIBELS ON PARLIAMENT AND RIGHT TO PUBLISH PARLIA- MENTARY DEBATES	105
VII. LIBELS AND COMMENTS ON COURTS OF JUSTICE, REPORTS OF TRIALS, AND COMMENTS ON PUBLIC MATTERS . .	121
VIII. ABUSE OF SPEECH AND WRITING BY DEFAMATION . . .	141
IX. THE CHARACTERISTICS OF LIBELS AND EXCUSABLE LIBELS	163
X. THE REMEDIES FOR LIBEL BY CRIMINAL AND CIVIL PRO- CEEDINGS	207
XI. COPYRIGHT	241
XII. PATENT RIGHT AND TRADE MARK	318

*DIVISION OF THE LAW RELATING TO THE
SECURITY OF PUBLIC WORSHIP.*

CHAP.	PAGE
I. THE TENDENCY TO PUBLIC WORSHIP AND THE LAWS AS TO SUNDAY PROFANE SWEARING AND WITCHCRAFT	349
II. MEANING OF WORDS AND PHRASES RELATING TO THE CHURCH AND CONVOCATION	370
III. PARISHES, BENEFICES, ADVOWSONS, AND SIMONY	389
IV. ORDERS OF BISHOPS, PRIESTS, AND DEACONS, AND INSTI- TUTION INTO BENEFICES	406
V. THE PROPERTY OF THE PARISH CHURCH AND INCUMBENT'S RESIDENCE	427
VI. MAINTENANCE OF THE CLERGY AND THEIR TITHES	447
VII. THE DUTIES, DISABILITIES, EXEMPTIONS, AND PRIVI- LEGES OF THE CLERGY	470
VIII. OFFENCES AND PUNISHMENTS OF THE CLERGY	491
IX. TOLERATION AND DISSENTERS	515

CONTENTS.

DIVISION OF THE LAW AS TO THE SECURITY OF THOUGHT, SPEECH AND CHARACTER.

CHAPTER I.

INTRODUCTION TO THIS DIVISION OF THE LAW.

	PAGE
Natural tendency to indulge in free speech	3
Essential restraints to free speech on public grounds	5
Restraints on free speech on ground of defamation	6
Natural tendency to acquire character and reputation	6
Personal character likened to a species of property	7
Security of character and reputation protected by law	8
When protection of character is preferred to free speech . . .	9
Chief medium of thought is speech and writing	10
Double aspect of the exercise of free speech	11
Freedom of thought as developed in public meetings	12
Freedom of thought in lecturing and addressing audiences . .	13
Freedom of petitioning the Crown and Parliament	13
Liberty of the press restricted like free speech	14
Freedom of thought viewed as a property and as copyright . .	14
Freedom of thought viewed as patent right and trade mark . .	16
Arrangements of chapters in this division	17

CHAPTER II.

FREEDOM OF PUBLIC MEETINGS AND ADDRESSES AND PETITIONS.

Freedom of public meetings	19
Places of public meeting how far restricted	21
Right to hold public meetings in public parks	22
Restrictions on public meetings according to subject matter .	23
Public meetings within a mile of Houses of Parliament . . .	24
Societies and clubs having unlawful objects and oaths	24
Debating societies	26
Protection of public meetings against disturbance	27

	PAGE
Restrictions on places for lectures and addresses	29
Right to petition Crown and Parliament	30
Statute relating to meetings to petition Crown and Parliament	32
Subject matter of petitions to Parliament	32
Petitions to Crown and Parliament must be respectful	34

CHAPTER III.

FREEDOM OF THE PRESS AND OF CORRESPONDENCE BY POST.

Liberty of the press and its definition	38
Liberty of the press the greatest of all liberties	41
The ancients on free speech and thought.	42
Early restrictions as to number of printers	43
Restrictions on printers as to keeping copies and putting their names on papers.	46
Printers' contracts and custom of trade	48
Registration of printing presses	49
Early practice as to censorship of the press	50
Early doctrines as to the publication of news	52
Oldest statute laws as to false news.	53
Right to publish news generally	54
Maliciously publishing what is known to be false	56
Special laws as to newspapers	56
Freedom to publish newspapers, and how far they are capable of suppression	57
Postage facilities for newspapers	58
Advertisements to recover stolen property	59
Security of post-office letters	59
Post letters may be opened by Secretary of State	60

CHAPTER IV.

RESTRICTIONS ON THE PRESS AND SPEECH AS REGARDS BLASPHEMY AND IMMORALITY.

Blasphemous words and publications	61
Apostasy as a crime	62
Early statutes against blasphemy	63
The existing statute against blasphemy	64
Statute does not repeal common law against blasphemy	65
Remedy against blasphemies	67
Punishment of blasphemy	68
Immoral and obscene publications	69
Attempted definition of immoral and obscene writing	70
Seizure and destruction of obscene publications	70
Punishment for immoral or obscene libels	71

CHAPTER V.

ABUSE OF FREE SPEECH BY SEDITIOUS WORDS AND WRITINGS.

	PAGE
Sedition generally	73
Right of the subject to comment on public affairs	75
Views of the ancients about public opinion	76
Early views as to comments on public affairs	77
How far a seditious libel can be defined	80
What is the essence of seditious libel	81
Importance of juries in defining seditious libels.	83
Proclamations of the Crown as to seditious meetings	84
Sedition at public meetings	85
Libels on the Sovereign	86
The older doctrines as to speaking against the Sovereign	87
Modern cases as to seditious writings against the Sovereign	89
Recent statutes against intimidating the Sovereign	91
Libels on Ministers of State	92
Libels on the constitution	95
Some examples of libels against the constitution	96
Arresting publishers of seditious and blasphemous libel	97
Remedy by <i>ex officio</i> information of Attorney-General for sedition	99
Procedure in the <i>ex officio</i> information	101
Policy of <i>ex officio</i> informations	102
Punishment for seditious libel.	103

CHAPTER VI.

LIBELS ON PARLIAMENT AND RIGHT TO PUBLISH PARLIAMENTARY
DEBATES.

Peculiarity of libels on Parliament	105
The privilege of Parliament	106
Jurisdiction of Parliament and courts of law contrasted	107
Early instances of Parliament exercising its privileges	109
The power of committal for breach of privilege	110
Instances of libellous comments being breaches of privilege	112
Other modes of punishing a breach of privilege	114
Publishing Parliamentary debates at first treated as breach of privilege	115
Newspaper reports of debates now permitted by Parliament	117
Punishment for breach of privilege	119

CHAPTER VII.

LIBELS AND COMMENTS ON COURTS OF JUSTICE, REPORTS OF TRIALS,
AND COMMENTS ON PUBLIC MATTERS.

	PAGE
Contempt of court by interfering with the business	121
Fair comments on the judgments and conduct of judges	124
The right of the public to enter courts of justice	125
Right to publish reports of courts of justice	126
When published reports of trials are treated as contempts	127
Publishing reports of a trial which occupies many days	129
What is a court of justice	130
Reports of <i>ex parte</i> proceedings in courts of law	130
Reports of applications to courts which have no jurisdiction to entertain them	131
Reports of trials must be fair and without comments interspersed	131
How far the report must be verbatim or abridged	132
How far contempt punishable if act is done out of court	133
What courts can commit for this contempt	134
Punishment for contempt	135
Contempt of inferior judges and courts	136
Comments on conduct of public officers	136
Comments on private persons who challenge or invite public notice	137
Comments and criticisms of books, pictures, &c.	138

CHAPTER VIII.

ABUSE OF FREE SPEECH BY DEFAMATION.

Libels on personal reputation	141
Difficulties in defining personal libel and slander	142
Definition of libel and slander of individuals	144
Distinction between libel and slander	144
Practical effect of distinction between libel and slander	146
Distinction between slandering and scolding	147
Threat to publish a libel	148
Libel viewed as constructive breach of peace	148
How far malice is an ingredient in libel	149
Construction of the libel or slander	151
The medium of the libellous act	152
Libelling classes of persons, corporations, and firms	153
Libels on the dead	154
What kind of publication necessary for slander and libel	156
Whether publication is <i>per se</i> the crime of libel	157
Mode of proving publication of libel	158

	PAGE
Liability of bookseller and shopkeeper for libel	159
Liability of proprietor of newspaper for libel	160
Publishers and booksellers of defamatory libels may in some cases escape liability	161
Liability of third party for causing libel to be published	162

CHAPTER IX.

THE CHARACTERISTICS OF LIBEL AND EXCUSABLE LIBEL.

Contents of a slander or libel	163
Libel or slander imputing a crime	163
If the offence imputed is past and punished	165
Imputation of what was once an offence but not now one	166
Libel imputing impossible crime	166
Imputation of attempt to commit crime	167
Words not clearly imputing definite crime	167
Libel calling scurrilous names	168
Libels exposing to hatred, contempt, or ridicule	169
Slander imputing immorality or unchastity	172
The kind of special damage following a charge of immorality	173
Slander of chastity causing special damage	174
If words imputing unchastity are written then they are actionable	175
Slander and libel of professional misconduct or incompetency	175
Rival tradesmen libelling each other	178
Defaming one holding public or honorary office	179
Defaming one holding office of profit	180
Action of scandalum magnatum	180
Liability for repeating a slander or libel	182
Excusable libels on privileged occasions	184
Misuse of words "privileged occasion," "privileged communication"	184
Excuse of libel in giving servant's character	186
Excuse of slander and libel as between those confidentially related	189
Excuse of libel in protecting pecuniary interests	191
A privileged occasion must not be abused to cloak malice	192
Libellous complaints to official superiors of a party	193
Excuse of slander and libel in judicial proceedings	195
Excusable slander by justices of the peace and others	197
Excuse of libel in publishing speech delivered in Parliament	197
Excuse of libel in publishing Parliamentary papers	199
Mode in which Parliament protects against courts of law its publication of official papers	200
Conflict of courts of law and Parliament ended by statute	203
Excuse of libel in publishing reports of legal proceedings	203
Excuse of libel in publishing reports of public meetings	204
Slandering from the pulpit	206

CHAPTER X.

THE REMEDIES FOR LIBEL BY CRIMINAL AND CIVIL PROCEEDINGS.

	PAGE
Remedies for libel.	207
Old remedy in ecclesiastical court	208
The remedy by criminal information	208
Conditions of granting criminal informations	208
Indictment for libel and charge before justices.	210
Preliminary hearing before justices	211
Arrest of libeller by judge's warrant	212
Form of trial of indictment or information for libel	213
How far truth of libel is defence in criminal proceedings	213
Defence of publication by reason of public benefit	215
Effect of not contradicting promptly or prosecuting for de- famation	216
Functions of juries in deciding on libel cases	217
Nature of contentions as to judges' ruling before Fox's Act.	217
Unsatisfactory state of law before Fox's Act	219
Modern practice since Fox's Act as to functions of juries in libel cases	220
Functions of judge in criminal trial for libel	222
Finality of verdict of jury on indictment.	222
The punishment of libel	223
Mitigation of punishment for libel	226
Security for good behaviour part of punishment	226
Seizing and destroying blasphemous and seditious libels	228
Ordering libel to be burnt	228
No summary remedy or injunction for libel	230
Costs in criminal prosecutions for libel.	230
Remedy for slander or libel by action of damages.	232
The pleadings in actions for libel	233
The defence to action that libel is true.	234
When libel is said to be substantially true	236
Interrogatories and evidence in cases of libel	237
Defence for libels in newspapers.	237
Functions of the judge in trials of actions for libel	238
Damages in actions for libel	239
Limitation of time for bringing actions for libel	239
Costs in actions for libel and slander	240

•

CHAPTER XI.

COPYRIGHT.

First notions of copyright in English law.	241
First Copyright Act of Anne in 1709	243
Practical effect of the Copyright Acts on authors.	245
Progress of early decisions as to common law copyright.	246

	PAGE
Reasons why copyright does not differ from other rights . . .	248
Reasons alleged for confiscating author's copyright . . .	249
What is meant by perpetual copyright at common law . . .	251
Copyright as easily identified as other property . . .	252
Chief causes of the differences between early judges as to copyright . . .	254
False analogies in early treatment of copyright . . .	255
Nature of copyright in MS. works . . .	258
Lending copies of MS. works to friends . . .	258
Copyright in MS. assignable . . .	260
If there can be dedication of MS. to public . . .	261
Publishing MS. against owner's will . . .	262
Bankruptcy of owner of MS. . . .	263
Copyright in lectures and addresses. . . .	265
Right of property in unpublished letters . . .	266
Whether letters are joint property of writer and correspondent . . .	268
Publishing letters without writer's consent . . .	270
Copyright in letters to newspapers, officials, &c. . . .	270
Who is an author and what is literature . . .	271
First publication in United Kingdom . . .	272
International copyright Acts . . .	272
Fixing price of book and compelling re-publication . . .	274
What is a book under copyright Acts . . .	274
Copyright in newspapers . . .	275
If MS. or book is immoral, blasphemous, or seditious . . .	276
The date of publication . . .	277
Registering book under copyright Acts . . .	278
Assignment of copyright in printed books . . .	279
When author has not the radical copyright . . .	281
Crown copyrights . . .	281
University copyrights . . .	283
Crown copyright in translation of Bible . . .	284
Crown copyright in statutes and proclamations. . . .	285
Copyright in law books . . .	285
Copyright in reports of cases in courts of justice . . .	286
Infringement of copyright generally . . .	287
Copyright in directories and <i>quasi</i> mechanical books . . .	289
Infringement of copyright by books on same subject. . . .	290
Infringement by copying title of book. . . .	290
Infringement of copyright by way of a review. . . .	291
Infringement of copyright by adding notes . . .	291
Infringement by way of abridgment . . .	292
Infringement by importation of pirated copies . . .	293
Interference of copyright by reciting or dramatizing. . . .	294
Remedy by action for infringement of copyright . . .	295
Remedy by way of penalties for infringement . . .	297
Injunction as a remedy for infringement . . .	297
Copyright in periodicals and contributions thereto. . . .	299
Peculiarities in contracts with authors . . .	300
Copyright in dramas . . .	301
Assignment of right of representing dramas. . . .	303

	PAGE
Infringement of right of representing dramas	304
Censorship of plays still retained	305
Regulations as to places where plays are performed	307
Licenses to keep theatres	309
Right of public to applaud and hiss plays	310
Copyright in engravings	312
Copyright in paintings, drawings, and photographs	316
Copyright in sculptures	316
Copyright in designs for ornament and utility	317

CHAPTER XII.

PATENT RIGHT AND TRADE MARK.

Patent right generally	318
Distinction between copyright and patent right.	319
Confusion in early ideas of patent right	321
Definition of subject-matter of patent	323
Patent implies something corporeal and material	324
Novelty as an element of patent	325
Utility as an ingredient of patent	327
Prior publication, or user of patent.	327
Defence that patentee not first inventor	329
Patent including several distinct things	329
Patent as a joint invention	330
Patent for a principle or process	330
Requirements of the specification of patent	331
Registration of patents	334
Assignment of patent rights	334
Distinction between assignment and license to use	335
Relation between patentee and his licensee	335
Infringement of patent	336
Injunction against infringement of patent	337
Questions for jury on trial of patent cases	338
Extending, altering and repealing patent	339
Object and origin of trade mark	340
Trade mark distinguished from patent	341
Use of trade mark is to identify maker of goods	341
Infringement of trade mark not necessarily fraudulent	342
Registration of trade marks	343
Usual characteristics of trade mark	344
Trade mark part of good will.	344
Trade mark usually protected by injunction.	344
Offences as to trade marks.	345

DIVISION OF THE LAW AS TO THE SECURITY OF PUBLIC WORSHIP.

CHAPTER I.

THE TENDENCY TO PUBLIC WORSHIP AND THE LAWS AS TO SUNDAY, PROFANE SWEARING AND WITCHCRAFT.

	PAGE
Tendency to public worship	349
Ecclesiastical laws subject to amendment	350
Laws of God and Christianity as part of the law	351
Profanation of the Sabbath generally	352
Early English laws relating to Sunday	354
General work and selling of goods on Sunday	356
Work of one's ordinary calling	356
Travelling on Sunday	358
Sports and games on Sunday ,	359
Legal business on Sunday	360
Houses of entertainment and debating societies on Sunday	361
Opening of public houses on Sunday	363
Offence of profane swearing	364
Extent of punishment for swearing	365
Witchcraft and fortune telling.	367

CHAPTER II.

MEANING OF WORDS AND PHRASES RELATING TO THE CHURCH AND CONVOCATION.

Early confusion about Papal jurisdiction	370
Meaning of words "Church and State"	371
Supposed alliance between Church and State	372
Alleged submission of the clergy	372
Royal supremacy in Church affairs	374
Meaning of words "Church" and "Protestant Episcopal Church"	376
Doctrines of Church, how far protected by law.	378
Alleged divine origin of canon law	379
Meetings of clergy in councils and convocations	380
Power of convocation as to canons	382
Power of convocation to make new canons	384
Convocation as a means of checking heresy	386
General control of Church property and Ecclesiastical Commissioners	387

CHAPTER III.

PARISHES, BENEFICES, ADVOWSONS AND SIMONY.

	PAGE
Origin of parishes	389
Origin of advowsons or right of presentation to benefices	390
Advowson as an appurtenant to land	391
Alienation and sale of advowsons.	392
Death of owner of advowson or presentation	393
Advowsons of Corporations, the Crown, and Papists	395
Advowsons as donatives	397
Offence of simony as to presentations	398
Statutes prohibiting and punishing simony	399
Sale of advowson or presentation while incumbent in dying state	400
Practice of resignation bonds	401
Remedy in case of simony.	403
Vacancy and exchange of benefices.	404

CHAPTER IV.

ORDERS OF BISHOPS, PRIESTS, AND DEACONS, AND INSTITUTION INTO BENEFICES.

A separate order of priests	406
Bishops and their original mode of appointment	407
Form of appointment by congé d'élire	409
Bishops as Peers of Parliament	410
Powers and duties of bishops	411
Deans and chapters, prebendaries, &c.	414
Archdeacons and rural deans	415
Perpetual curates and chapels of ease	416
Compulsory employment of curates	417
Lecturers	419
Qualifications of priests	420
Presentation of priests to a benefice	421
Fitness of presentee for institution	422
Ordination of priests and their learning	423
Institution and induction of presentee	425

CHAPTER V.

THE PROPERTY IN THE PARISH CHURCH AND INCUMBENT'S RESIDENCE.

	PAGE
Parson's freehold estate in the church	427
Consecration of churches	428
Repairs of church and church rates	429
Church bells, organ, and holy table	430
Ornaments in churches	431
Monuments and tombs in church and churchyard	432
Sacrilege	434
Duties of churchwardens as to fabric of church	434
Churchwarden's duty as to pews	435
Miscellaneous functions of parishes and vestries	437
Residence of clergy and repairs thereof	438
Governors of Queen Anne's Bounty	439
License for new residence	440
Dilapidations in ecclesiastical property	441
Obligation to keep in repair clergy house	441
Modern remedy for dilapidations	443
Letting and alienation of clergy houses	443
Pluralities in ecclesiastical livings	444
Union of benefices	445

CHAPTER VI.

MAINTENANCE OF THE CLERGY AND THEIR TITHES.

Origin of tithe and its development as a tax	447
Tithes as a tax enforced by legislative power	448
Origin of the appropriation of tithes	450
Distinction of parsons into rectors and vicars as regards tithes	451
Common law relating to tithe	453
Presumption of common law in favour of tithe	455
Different classes of tithes	456
Difficulties in applying law of tithes	456
What are tithable things and profits of land	456
Mode of recovery of tithe	458
Mode of setting out and delivery of tithe	458
Difficulties as to tithe of milk	460
Difficulties as to personal tithes	461
Modus substituted for tithe	461
Tithe Commutation Acts and rent charge	462
Finality of settlement of tithe rent charge	463
Recovery of tithe rent charge by distress	465
Pensions, Easter dues, and fees as maintenance	466
Quakers and recovery of tithes	467
Collecting alms in church	468

CHAPTER VII.

THE DUTIES, DISABILITIES, EXEMPTIONS AND PRIVILEGES OF
THE CLERGY.

	PAGE
Duties of clergy towards the public	470
Uniformity in ceremonies of public worship	472
Mode of worship fixed by statute	473
Sources of the law as to public worship	474
Details of public worship how settled	475
Leading ceremonies in public worship	476
Position of minister during worship	478
Vestments of the clergy	479
Clergy engaging in trade	480
Clergymen entering Parliament	481
Celibacy of the clergy	482
Celibacy of clergy in England	484
Some recreations of the clergy restrained	486
Privileges and exemptions of clergy from taxes and duties.	487
Offence of disturbing divine service.	489
Resignation of office of priest.	489

CHAPTER VIII.

OFFENCES AND PUNISHMENTS OF THE CLERGY.

Jurisdiction of Ecclesiastical Courts generally.	491
Ecclesiastical Courts watched by temporal courts	494
Excesses of Ecclesiastical jurisdictions	495
Remedy under Church Discipline Act against clergy	497
Clerical offence of schism.	498
Heresy.	499
The punishment of heretics	501
Offence of contravening thirty-nine articles	502
Duty of Courts in interpreting articles and Prayer-book.	503
Offences of immorality and drunkenness in clergy.	504
Celebrating public worship in another parish or another chapel	505
Preaching in private houses and buildings	507
Various punishments of clergy	507
Excommunication as punishment	508
Suspension as punishment	509
Sequestration as punishment.	510
Deprivation as a punishment.	511
Punishment for contempt of Ecclesiastical Courts.	511
Penance as a punishment.	512
Peculiarities in offences of clergy	514

CHAPTER IX.

TOLERATION AND DISSENTERS.

	PAGE
Intolerance is a law of nature	515
The ancients on toleration.	516
The early Christians on toleration	517
English Statutes of Intolerance before William III.	519
The Toleration Act of 1688	521
Progress of legislative toleration after William III.	524
Progress of public opinion after Toleration Act.	527
Dissenters' trust property and mode of preserving it	529
Mode of interpreting dissenters' trust deeds.	529
Dissenting congregations and their pastors	531
Dissenting congregations changing their creed or mode of worship	532
Civil and religious freedom of dissenters and Churchmen	534
Quakers and Unitarians as dissenters	535
Roman Catholics as dissenters	536
Popish recusants refusing to attend church	538
Romish priests and teachers	538
Oaths required from Roman Catholics.	540
Roman Catholics holding property	540
Relief to Roman Catholics by degrees.	541
Jesuits	543
Jews and their religion.	545
Early expulsion of Jews from England	546
Contracts and property of the Jews	547
Civil and religious liberty of Jews	548
Street preaching	549

*OF THE SECURITY OF
THOUGHT, SPEECH, AND CHARACTER.*

CHAPTER I.

INTRODUCTION TO THIS DIVISION OF THE LAW ENTITLED "THE SECURITY OF THOUGHT, SPEECH, AND CHARACTER."

Natural tendency to indulge in free speech.—The faculty of rational speech, which distinguishes man from the lower animals, keeps society together, and enables the individual to work out the purposes of life through all its varied circumstances and occupations. While speech is the medium of the thoughts, the manner in which the mind works, and in which the various passions, affections, and desires are communicated from one to another, lies altogether beyond the domain of the law. Governments in all stages of barbarism have feared and prohibited speech, because it is the vehicle of combination and resistance ; but while life endures, no physical contrivance short of continuous torture has been found able to suppress it. Thought is too subtle a power to be baffled or invaded. How language grows from the rude signs and noises of savage life into a complex and varied scheme of sounds, indicative of all the phases of refined sentiment and emotion, may be a proper inquiry for philosophers. But by the time society has advanced to the stage when human occupations have become sufficiently subdivided to require the protection of the law, language has been gradually formed into a settled system of expression. The law accordingly, when it confronts this irrepressible tendency of mankind to give expression to all their sentiments, desires, and passions, finds it inevitable to search out some first principle, and that principle is none other than this, that Thought must, or ought to be, free, and Speech, being only

the vehicle of thought, must equally be free. It is seen to require no restriction, except in so far as its use may in certain times and situations interfere with the equal freedom of others in pursuing their varied avocations.

And yet this simple proposition, that thought and speech are free has been arrived at only after the painful experience of ages. Emperors, kings, parliaments, popes, and synods all began with the barbarous notion, that somehow free speech was a gift of their own to their subjects, and so must be accepted on their own conditions. Their first assumption was, that nobody should take the liberty to have any thoughts or opinions of his own, but must wait till some wise men of the time, or of the old time before them, should dictate to him the right thing to say, and even to think. The stubbornness of mankind constantly surged and resurged against this treatment, and innumerable martyrs were obliged to have their hands or tongues cut off, their bodies mangled and sawn asunder, or burnt alive, before the experiment was worked out, as to which of these two opposing forces was the master. Whether this conflict is yet at an end everywhere, some governments at least have long ago surrendered, being satisfied that they have met with a force which they can neither conquer nor annihilate; and that at most they can only regulate its exercise to a very small extent. They have learnt that it is idle, impotent, and vain to continue the conflict longer on the old basis; and therefore they admit that the primary right of all men is to think and say what they like both about themselves and everybody else, and for this simple and all-sufficient reason, that no power known to mankind has been discovered strong enough to compel them to abstain. All that remains is therefore to see, in what directions and on what conditions the feeble restraints left available can be brought to bear. And these will be found varied, circuitous, manifold and cumulative.¹

¹ PHILLIP II. of Spain said that a king was never more secure from the malice of his people than when their discontents were suffered to evaporate in complaint.—1 *Wroxall's Fr.* 96. SOCRATES said the sun could as easily be spared from the universe as free speech from the liberal institutions of society.—*Apud Stob. Eth.* xiii. TIMOLEON said the end of all his achievements against tyrants was to secure free speech to the meanest citizen.—*Corn. Nep.* xx, 23.

Essential restraints to free speech on public grounds.

—The restraints which confine the natural liberty of speech will be found ranged under four great heads of blasphemy, immorality, sedition, and defamation. There are bounds to be set to the expression of thoughts and opinions, and these must rest on the fundamental principles on which all societies are founded. It is assumed that there is a God in whom all citizens in their gravest moods are so interested, that it becomes offensive to all the rest if any one speaks of Him publicly in a scurrilous and contemptuous tone, such as would in a subject provoke a breach of the peace. Hence the first limit to free speech is Blasphemy. There are also rules of morality which are so universal, and so underlie the conscience of every individual, that speeches and writings which treat these rules with public contempt, and sap and mine the simple faith in all that is good, noble, and worthy, are also deemed a species of constructive breach of the peace too irritating to be allowed. Hence another limit to free speech and writing is Immorality. Again, there are rules of good conduct founded on the general duty of all citizens to support the government under which they live, and if possible to insure due respect and fair treatment to its leading administrators. Hence gross contempt of all laws and violent menaces of revolt against such guardians must not be allowed, for these necessarily discompose every citizen, and perplex him with fear of change or fear of public disaster and anarchy. And when this last head is still further examined, it will appear that the great factors of Government, consisting of the Sovereign, the Parliament, the Ministers of state, the Courts of Justice, must all be recognised as holding functions founded on sound principles, and to be defended and treated with an established and well-nigh unalterable respect. Each of these great institutions has peculiar virtues and peculiar weaknesses; but whether at any one time the virtue or the weakness predominates, there must be a certain standard of decorum reserved for all. Each guarded remonstrance, each fiery invective, each burst of indignation must rest on some basis of respect and deference towards the depository for the time being of every great constitutional function. Hence another limit to free speech and writing is Sedition.

And yet within that limit there is ample room and verge enough for the freest use of the tongue and pen in passing strictures on the judgment and conduct of every constituted authority.

Restraints of free speech on ground of defamation.—While the restrictions already mentioned, which are founded on blasphemy, immorality, and sedition, show the boundaries of free speech and thought as affecting the public generally, there is a fourth limit on the other side as affecting individuals, known under the head of Libel, or the invasion of the reputation of private persons. This last limit involves the necessity of at once tracing the origin of that tendency of the individual to acquire such reputation and the value it possesses in his eyes, for it is here that the exercise of one natural right clashes directly with the exercise of another, and both are equally natural and equally inevitable.

Natural tendency to acquire character and reputation.—A survey of the worldly career of each individual from youth to age makes it fully apparent that all the keenest aspirations and desires of the individual are best attained in proportion to the greater influence he acquires over his fellow men. The mode in which this influence is acquired and its presence felt is by creating in others a belief that he is possessed of integrity, truthfulness, and other virtues of social life. These are usually denoted by one compendious word—the character or reputation of the individual—the possession of which character is a self-satisfying and legitimate source of happiness in itself, an essential feature of existence in all phases of civilisation.¹

¹ “It never can or will be disputed that a man is entitled to that tranquillity, happiness, and peace of mind which is the result of an honourable reputation, provided his conduct in life entitles him to it. There is implanted in every man’s bosom an invincible sensibility to the opinion of his fellow creatures, which nothing can destroy. It is the foundation of all patriotism, the sentiment which rears states from infancy to maturity—the principle that makes men struggle for distinction and keeps them in the straight paths of their duty when called to the high offices of magistracy. The laws of society therefore protect mankind in this dearest of all human blessings; and if any man writes of another that which is injurious to him in his trade, profession, or character, or which tends to expose him to penalties, or brings him into contempt, it is libellous,

Personal character likened to a species of property

—The law, which so often looks upon the acquisition and retention of the power of dealing with property as the great object and business of life, and of its own primary care, is never so well satisfied with its solution of a difficulty as when it can liken all other objects of its regard to a species of property, which can be seen, and handled, and weighed. Hence it is a familiar expression, that a man has a species of property in his own body and limbs, or in the health of his constitution, or in the thoughts of his brain. In the same sense he is said also to have a species of property in his own character and reputation, and it is because this consciousness is a valuable possession that the law will encourage and protect it against attacks.¹ These figures of speech assist in explaining what is unknown by some analogy to what is known and familiar. As a man in the course of his life accumulates property or a stock in trade, which is the source of his satisfaction, so in the course of his conduct he displays a certain combination of habitual qualities which give third parties the means of forming an estimate of his mind and the extent of his power. This estimate is nothing else than his character or reputation. So long as a definite character is ascribed by common observation to his name and person, it acts upon the rest of the world as a means of happiness to him, with the same certainty and regularity as a stock of material and visible property always does in increasing one's business and wealth. The consciousness of possessing, or, which is the same thing, of conducting himself in such a manner as to retain, this character, is a fund of positive social enjoyment which the law gives credit to every individual for possessing or desiring to possess—a primary element of human nature incapable of being analysed into anything simpler. In short, every man as a good citizen is presumed by the law to be anxious to acquire and keep such character,

and the law deems it an object of penal animadversion.”—*Erskine*, (*arg.*) *R. v. Cobbett*, 29 St. Tr. 63.

“The individual, by the combination of opinion and the force of character, begets in his own reputation a property more valuable than the brute materials to which the crude notions of property are first applied.”—*L. Abinger* (*arg.*) *Mem.* 284.

¹ *De Crespigny v. Wellesley*, 5 Bing. 392.

and even the appearance of it. The constituents of a good character are various, and include every combination of virtues which a human being is capable of attaining. Integrity, veracity, generosity, charity, industry, patriotism and religious zeal may enhance the character of individuals in actual life, but these qualities are too ethereal and refined to be either created, retained, or enforced by the law. The law can neither give nor take away these and other high attainments which go to the composition of the worthiest citizens. The law sets to itself a much coarser standard. It views the character of an individual as just good enough, and no more than suffices, for acquiring or retaining property, or influence over others, and (which is generally the same thing) as a means of livelihood. It gives credit to every individual for a desire to avoid breaking its own injunctions—more especially the leading rules against treason, murder, larceny, and other indictable offences, for no well-affected citizen would associate with those who break primary laws, and who are, or ought to be, on that account his natural enemies. In addition to this negative virtue, the law also takes notice of other virtues which are involved in ordinary social life. In short, it gives credit to each individual for a desire to retain the good opinion of his fellow men, and to practise the common virtues, for in this lies the source of all his influence over others for the furtherance of his own objects, and every man must have personal objects of some kind, worthy or less worthy.

Security of character and reputation protected by law.—Hence, if any one imputes to another the commission of an act which would amount to an indictable offence, or which implies the absence of some every-day virtue, and so tends to cause one to be shunned by good citizens in matters of business or pleasure, these are all viewed by the law as attacks on the funded reputation of the individual, and as a despoiling him of something valuable, which the law will assist in checking by its usual machinery of informations, indictments, and actions. When a man is shunned and distrusted in the leading affairs of life, he loses the means by which he acquires and retains influence, wealth, and happiness. And yet mistakes may be made on both sides. Hypocrisy and

fraud may be covered with a show of virtue, while malignity; envy, and unscrupulousness, as often as a wholesome zeal for honesty, may seek to tear off the mask and denounce the pretender. It is honourable to enjoy and defend reputation, as it is also honourable and pleasant to denounce hypocrisy and imposture. Both are honourable, but when they cannot both be had at one and the same moment, on one and the same subject matter, the law is bound to make a choice, and it naturally prefers him who defends his possession of reputation against him who at most is only indulging his freedom of speech about somebody else. The one right lies closer to one's thoughts and has more of the positive; the other is mostly only a negative deprivation. Hence, whenever reputation is attacked, the law sides with its possessor against the mere exercise of free speech. But when it can be shown that he who exercised this free speech was in reality in the pursuit of his own immediate business and interest, which to him was all in all, and as valuable as any other person's reputation, then the law again changes sides, and holds that he, who is lawfully pursuing his own immediate interests, and to whom freedom of speech is essential to enable those interests to be maintained and advanced, shall be protected in that freedom of speech, whatever be the consequence. Such are the views on which the law acts sometimes on one side and sometimes on the other. Those occasions on which the law protects freedom of speech are often called privileged occasions, and the kind of lawful business so protected is that of exchanging confidential views about one's private business and friends, and about the nation's business, which is every man's private business within certain limits.

When protection of character is preferred to free speech.—As a general rule, therefore, the protection of one's character and reputation comes home to each more closely than any exercise of the right of censure, denunciation, and criticism of third parties; and hence free speech, if nothing more is involved, must give way to the desire of maintaining reputation. It is in every way more salutary, that he whose character is libelled should be protected, than that he who libels should be able to speak his mind freely. Both are good; but if they clash and

become incompatible, the better must be preferred. And hence arise all the rules and qualifications of the law of libel, which is nothing else than a summary of those instances in which the law prefers one's reputation to another's free speech, and in which the prosecution of one's personal interests, and of the public interest as part of that personal interest, will be protected in the exercise of free speech, in preference to the reputation of a third person. The details of all these distinctions, which are at first somewhat bewildering, will be shown in a later page in their natural order and mutual relations.

Chief medium of thought is speech and writing.—And further, before the law can properly deal with those who attack the reputation of others, some notice must be taken of the medium through which this is done. The two leading vehicles of thought are, first and above all others, the faculty of writing or speech; and secondly, printing; but there are other less important means of the same general character, namely, painting or drawing, and any signs and symbols of thought; and even gestures may be employed with like effects. Speech is transitory, and operates only within the range of a limited audience, and perishes with the memory of those who listened.

Writing, as a vehicle of thought, is more durable in its effects, and may circulate beyond the range of the speaker and the hearers; and its influence may be communicated over a wider area. It exists in a stereotyped form, and may be referred to and comprehended by an indefinite number of individuals. Again, printing is only a higher degree of the same mode of publicity, and in its nature, owing to the perfection the art has attained, and the extension of education, tends to circulate over a still wider area—an area which can only be limited by the living generations of man, and not even by these. Painting or drawing in some respects resembles the vehicle of writing and printing, and it may be incorporated in both, or may be circulated by itself in an independent shape, and even a gesture or an attitude may in certain circumstances be as expressive as any speech. As a general rule, the wider the imputation spreads, the greater is the damage and injury to the character assailed.

All these vehicles of thought and expression, therefore,

differ from each other chiefly in degree, according as they are calculated to reach a greater or less number of individuals, and as a general rule, the greater the number of people to whom a false or unlawful accusation is communicated, the greater is the blow to one's character and reputation, and therefore the greater the punishment needed to correct it.

Double aspect of the exercise of free speech.—From all that has preceded it will be seen, how necessary it is, especially in an age when civilisation has restored to the utmost the natural freedom of thought and speech, and at the same time has carried to so high a pitch the arts of printing and publishing, that there should be some check put upon envious, passionate, or malicious representations which create a false impression of a neighbour's character, and thereby weaken its natural influence over others. Constituted as human nature is, and with tendencies of good and evil, consideration must be given to the mischief that may be done by marring the advancement of virtue and intellect, which are the dominant forces governing reasonable men, and on whose free development the happiness of the world mainly depends. To think and speak as every man inclines is indeed one of the primary tendencies which the law encourages, simply because it is natural and irrepressible. But as our conscience informs us that while there are those who seek to think and speak well, there are others who from base motives or blind passion seek for unworthy ends to thwart the legitimate influence of another's character, the latter must be restrained and punished, in order that that other might be let alone, and in order that high character may work out its own reward. The law takes for granted, that the universal conscience of mankind recognises the one course as good and the other course as evil, and that all that is necessary is merely to restrain so much of the evil as unduly checks the progress and development of the good. It is the object of the law to methodise and define the clear practical rules by which the perversion of speech or writing may be punished. Except in so far as the law, whether common law or statute law, has put some restraint, thought and speech are free, whether in public assemblies or private conversations.

The highest faculties of man, and those by which everything good is promoted in the world, and by which society is elevated in its tone, mainly depend on speech and writing. It is therefore of the last importance in all well-regulated communities that as few restrictions as possible should be put by the law on the free play of thought—¹ that the satirist, the preacher, the patriot, the moralist, or the politician should be allowed to circulate his thoughts to the full extent, for it is by free discussion that public opinion is educated, and the public good promoted, by which bad laws are altered, and pain and suffering diminished among mankind; and as this can usually be done without misrepresenting or libelling individuals and unduly crippling their influence, the restraints of the law are framed only to check abuses of this primary freedom of thought and speech.

Freedom of thought as developed in public meetings.—The most prominent of all the manifestations of freedom is that of public meeting. By this is meant not the liberty of corporations to meet in large numbers, or the liberty of mayors, lords lieutenant of counties, or sheriffs or justices of the peace in their official capacity to invite together as many of the public as choose to attend and hear a discussion of any grievance or matter of interest, which the official head thinks reasonable and proper to discuss. But a public meeting is an assemblage of large numbers called together by any member of the public as a volunteer, whenever he thinks that his neighbours will be sufficiently interested to join with him in discussing some topic of the hour, and who does so without any licence of any official—without notice to any official—and without any official whatever being present, or having any participation in or power over the proceeding. So long as such public meeting can be held at the call of any voice from the crowd, and the people can meet in any numbers without let or hindrance and discuss and exchange their

¹ Besides the right which nature has given to every man to his property, his freedom, and his life, she has also conferred on him a fourth right, that of defending the former three; and government is nothing more than a systematic mode of carrying this fourth right into convenient and complete effect.—*Beaufoy, M.P. 28 Parl. H. 420.*

sentiments on anything and everything that concerns them—that touches their interests or their feelings—this is as near the enjoyment of perfect liberty as is attainable. No limit can be assigned to the variety of the subject matter which may thus call the public together. The only restrictions possible are those which arise out of the danger of saying something blasphemous or grossly immoral or seditious, something amounting to a contempt of Parliament or of a court of justice, or defamatory of some individual, as to each of which excesses the speaker may afterwards be called to an account. The liberty of expressing to large meetings without let or hindrance every thought as it occurs, whether wise or unwise, so long as the limits here indicated are not reached, is the characteristic of a public meeting; and the holding of public meetings is one of the most important exercises of free speech known to mankind.

Freedom of thought in lecturing or addressing audiences.—It is only another form of the liberty of public meeting, when any person takes upon himself after previous notice or otherwise to deliver a lecture to many persons or make a speech or address to them on any subject to which they will consent to listen. If no previous permission or consent of any official is required, and the only limits to be observed by the lecturer or orator are those already set forth in reference to public meetings, this also is an element of public freedom which comes home to every citizen.

Freedom of petitioning the Crown and Parliament.—Akin to the right of public meeting and the right of lecturing, though not necessarily involving the formality of any large meeting of persons, is the right of petitioning the Crown or Parliament on any matter which is deemed to affect the interests of large numbers. It will be seen that this is an important mode of exercising freedom of speech and highly prized, inasmuch as it often influences the course of action of those who are in positions of the highest authority. It is to some small extent a participation in the very government of the country, for to use argument with, or even to obtain an audience of those who have in hand important issues affecting the public business, and to be able to make representations which

may or may not be accepted and acted upon is a mark of consideration, and at least a conspicuous exercise of free speech which relieves the mind and satisfies the understanding of those who are governed.

Liberty of the press restricted like free speech.—While the liberty of speech is coveted by the people as indispensable to their living under any well-balanced system of government, much more so is the liberty of the press, which is nothing more than the expansion of the other by mechanical means, thereby intensifying and making universal what might otherwise be spent on a small and isolated group of listeners. When any person is free to publish whatever he deems interesting or valuable either as a mode of procuring profit to himself or as a means of influencing the minds and will of his fellow-citizens on matters on which union and combination can effect great results, this is the highest mark of freedom, and when once enjoyed by a people will not easily be relinquished, and any attempt to tamper with it will provoke unappeasable clamour and resistance.

The freedom of the press, though exceedingly simple in its working when thoroughly attained and practised, has, like the great discoveries of science, been arrived at by painful steps and slow. All governments at first feared this new power as full of danger and charged with the seeds of anarchy, until, like the steam-engine, familiarity and skill of handling have made it thoroughly docile, and all-powerful for good. The limits imposed on the freedom of the press are precisely the same as those imposed on freedom of speech, with a slight difference as to the remedy, as will be afterwards explained. No power exists which can dictate to any author or publisher the subject matter of the publication; and the only limits to be observed are those of blasphemy, immorality, and sedition as affecting the public, and libel as affecting the individual. But in course of steering clear of those extremes there are numerous details and distinctions to be noticed, and until these are well surveyed the subject cannot be appreciated in its whole bearings on the affairs of practical life.

Freedom of thought viewed as a property and as copyright.—The right of free speech, as exhibited in public meetings, lectures, and addresses, and in petitions

to the government, and the liberty of the press as exhibited in the newspapers, and journals and books which any one is free to publish, do not represent the whole of this subject. There still remains an important right, namely, that of the authors or originators of all these publications. The person who creates a work is usually impelled to do so not merely by the hope of benefiting others and influencing the action of those who control the government or destinies of mankind, but by the hope of personal profit and reward for the labour involved in obtaining the power and skill to produce such results. The motives of authors are thus chiefly threefold—either purely philanthropic or purely mercenary, or partly composed of both the others. Those who address public audiences with a view to publication, especially on political affairs, may be said to be mainly philanthropic or patriotic: they are satisfied with the publicity given or acquired, and have no care about any personal profit. They throw their thoughts among the crowd, careless who may pick them up. On the other hand, authors who publish works involving continuous labour, skill, and thought, have usually some prospect of reward and personal profit as the main inducement, like all other persons who pursue a definite occupation or business. The labour involved in creating a book differs in no respect whatever from the labour employed on any other matter, and hence it would require very singular circumstances to make it manifest how the labourer in the one case should not have the same means of preserving and perpetuating his accumulations as the labourer in the other cases. Yet, singular to say, the conduct of the legislature and courts even up to very recent times has been so confused and void of all insight into the nature and origin of this simple and natural right, that they have sometimes misapprehended its position, have all but questioned its existence, and have ended by confiscating it for the alleged good of mankind, without rendering a reason. This singular mode of treatment will be made manifest in the whole history of copyright, both in parliament and in courts of justice. It is confessedly a right of some kind, and the various circumstances in which it originates, and the modes of dealing with and protecting it, involve many details which will be afterwards set forth.

And here again, while no constituted authority any longer dictates to authors what subjects they shall treat, or how they shall treat them, the same limits confine copyright as confine free speech. So long as the author shall not circulate any blasphemous, immoral, or seditious words, or any libel on an individual, there is no subject which he may not discuss almost at discretion, and the whole field of knowledge lies open to him.

Freedom of thought viewed as patent right and trade mark.—While copyright denotes that species of right which an author has in the book which he creates, so a right closely related to it is that which an inventor has in some mechanical adaptation, namely, the exclusive right of manufacturing copies or reproductions of things mechanical. The distinctions which exist between these two rights will be found to be considerable. The chief characteristic of both is this, that the mind of the author and inventor is that which creates or brings the subject matter into existence, while the other consideration, namely, the best mode of protecting and perpetuating the right as a species of property, necessarily varies with the individual instance. It is on account of this primary quality that patent is properly arranged under the head of free thought, because the ingenuity of man is boundless, and it is capable of embracing nearly every kind of matter which can be made useful to facilitate human occupations and human comforts. And there is an inherent right of every man to turn his faculties to the best advantage and acquire as much profit out of any exercise of these and out of anything he does as the subject matter will admit. Patent right is nothing but the right to make the most of one's own originality and insight into common mechanical articles, and is as much an exercise of free thought as the production of any book can be.

And, lastly, the right to a trade mark, though in some respects identified with the modes of selling goods, is more closely allied to patent right, for the same kind of ingenuity which distinguishes the inventor often belongs to the originator of a trade mark, inasmuch as it is only in reference to some ingenious manufacture that trade marks were at first invented, though also capable of being extended to things which do not involve any original merit whatever.

Arrangement of chapters in this division.—Having thus traced in outline the several heads which make up that positive and substantial right called the liberty of speech and of the press, or, in other words, the security of thought, speech and character—one of the most valuable of all the rights possessed by man in any country and under any system of government, the mode in which these heads may be most systematically arranged will be as follows:—The liberty to think and speak about everything in public, which is the primary right, will be first considered. This, when more amply surveyed, consists of speaking and exchanging thoughts with numbers of fellow-citizens in public meetings, subject to no other restriction than the avoiding of any blasphemous, immoral, or seditious words. Treasonable matter may at present be left out of account as being too closely connected with the protection of the Sovereign, and therefore with that other division of the law entitled “Government.” Free speech is exercised accordingly in public meetings, in lectures or addresses, and in petitioning the Crown and Parliament. Next comes the liberty of the press, that is to say, the reducing of speech or thought into writing or printing. It will be seen that the primary rule is here also the same, namely, that the press is free to all comers and on all topics. The subjects that may be discussed embrace everything that is of interest to mankind. But both free speech and a free press must not be abused to the extent of speaking or publishing what is blasphemous, immoral or seditious. Of these three limits, the more difficult and important is sedition, for that is the extreme limit about which a free press is most likely to go into excess, owing to the passions excited by the current politics of the day. The right of comment on all the great functionaries of the State being the life and soul of a free press, this tendency to seditious assumes frequently the form of libels on the Sovereign, on Ministers of State, on the Constitution or the Parliament, or Courts of Justice. And in dealing with libels on Parliament the subject of Breach of Privilege to some extent brings on a collision between the jurisdiction of Parliament, and Courts of Law in certain vital points. The liberty of the press also includes the publishing of the debates of Parliament and the reports of trials and proceedings in Courts of Justice, as well as comments on all

matters of public interest. And, lastly, the right of the public to communicate with each other by means of posted letters, and to protection against interference is a part of freedom. These are the main heads which make up the positive right of free speech and thought, and the correlative excesses to which it is subject in relation to the public at large.

But while the above are the more public portions of the right of free speech and thought, the abuse caused by the invasions of the character and reputation of individuals in the form of defamation creates many subdivisions and distinctions, and touches on a great variety of matters. After libel and its punishments, the next form which the right of free speech and thought assumes is that of a valuable property in the hands of the author who composes and publishes his thoughts. The subject of copyright embraces a great variety of details. And, lastly, the right of patent and trade mark is closely connected with the subject of copyright. When these topics are dealt with in their order, the details of this division of the law will be fully comprehended in all its completeness.

This first part of that division of the law entitled the security of thought, speech, and character, therefore, will consist of the following chapters:—

CHAP. II.—Freedom of speech in public meetings, lectures, and petitions.

„ III.—Freedom of the press and correspondence.

„ IV.—Abuse of free speech and the press by blasphemy and immorality.

„ V.—Abuse of free speech and the press by seditious words and writings.

„ VI.—Right to publish debates of Parliament.

„ VII.—Right to publish proceedings of courts of justice and reports of trials, and to comment on all public matters.

„ VIII.—Abuse of speech by libelling another's character.

„ IX.—The characteristics of libel and of excusable libels.

„ X.—The remedies for libel by criminal and civil proceedings.

„ XI.—Copyright.

„ XII.—Patent right and trade mark

CHAPTER II.

FREEDOM OF PUBLIC MEETINGS AND ADDRESSES AND
PETITIONS.

Freedom of public meetings.—The ancient tyrants always feared any large congregation of men in towns, and endeavoured to find rustic occupations for them, so as to separate them and divert their minds; and it is said Peisistratus commenced the building of the Temple of Jupiter for some reason of this kind.¹ The knowledge of human nature shown by Peisistratus has often been imitated by succeeding governors.

In this country before public meetings were resorted to as an ordinary exercise of self-government, great looseness prevailed in the law, the theory apparently being, that free speech was a species of gift by the Sovereign to the people. In the time of Charles II. the judges were consulted whether the king could by proclamation shut up the coffee-houses, which at that time were the great centres of conversation, though they existed under licenses from Quarter Sessions then current; and it is said the judges were by no means agreed.² At that period and long afterwards the common law was indefinite, but nevertheless the courts never went the length of laying down a positive rule of that law, that a public meeting could not be

¹ 2 Thirlw. Gr. 71.

² North's Exam. 139; Kennett, 337; Ralph, 297. The position of these houses at that era was said to be, that they were in the nature of a common assembly to discourse of matters of state, news, and great persons—"and as they were nurseries of idleness and pragmatism, and hindered the expense of our native provisions, they might be thought common nuisances."—*North, Ex.* 140.

held without the license of some public functionary. The very first instance of a modern public meeting was said to be one held by the electors of Westminster in Westminster Hall on August 29, 1769, to adopt a petition for redress of grievances. The practice of holding such meetings for discussing public grievances seems to have been largely developed by the excitement consequent on the expulsion of Wilkes from the House of Commons in 1770.¹ A law officer near the close of last century told the House of Commons, that England was the only country in the world where meetings to discuss grievances were allowed without the attendance of a magistrate, and that Ancient Rome, in the zenith of its liberty, never allowed the people to meet except in a regular body under official controul.² And the Government of that day came to the conclusion, that the right of public meeting had been abused, and that no meeting should thereafter be allowed except it should be called by the lord lieutenant, sheriff or other official, and that a magistrate should be able to put an end to it at once if he thought it riotous.³ It was pointed out, in answer to such a proposal, on the other hand, that public meetings ought not to be restricted; that they, and they alone, had contributed to put an end to the American War.⁴ Moreover, that it was mocking the understanding and feelings of mankind to tell them they were free out of the Houses of Parliament, so long as they could not meet for the purpose of expressing their sense of the public administration of the country, or of the calamities occasioned by a particular war then waged, and so long as any grievance or sentiment could not be declared without a magistrate considering it seditious and subjecting them to penalties.⁵ The proposal of the Government was carried out to a large extent about twenty years later.⁶ The Six Acts of 1819 were passed, only a few parts of which still are

¹ 2 Albemarle's Rockingh. 93; Lord Harrowby, H. L., 41 Parl. Deb. 1254; ³ Cooke's Hist. Party, 187. ² Mitford, S. G. A.D. 1795, 32 Parl. Hist. 308. ³ Ibid. ⁴ C. J. Fox, M.P., Ibid. 344. ⁵ C. J. Fox, M.P., 32 Parl. H. 279.

⁶ In that year persons presumed to hold a convention and assume all the functions of Parliament. The Crown was advised to arrest them as conspirators.—A. D. 1795, 35 *Parl. Deb.* 1230. The culminating point was in 1819 when the long delay in the reform of Parliament began to irritate the people, and the Manchester

in force, and one of them required, that no meeting of more than fifty persons should be held without a previous six days notice to a justice of the peace, and forbidding all but inhabitants of the county or parish to attend.¹ This last enactment was, however, limited to five years, and has not since been renewed.

And now there is no restriction on the holding of public meetings at the call of any person whatever, subject only to this, that whoever utters blasphemy, gross immorality, or sedition, may be called to account.² And if the assembly is turned into one which is illegal and riotous, that is a separate ground of punishment, owing to the terror caused, according to the turn taken in its progress.³

Places of public meeting, how far restricted.—One great obstacle to the right of public meetings has always been the finding of a place of meeting large enough, and not too large, for the purpose of hearing and being heard. This, indeed, is a difficulty which more peculiarly affects the poorest portion of the community, it being always within the power of the wealthy to obtain by purchase or some valuable consideration access to a convenient place if they choose to undertake such preliminary expense. For those who are not provided with this ready means of access, and who are mere members of the public, there is no appointed or legal place of meeting provided by the common law or by statute, and hence the risk of an action of trespass or some cause of action accruing to an individual owner arises, if they invade his property for the purpose of

meetings were held. In 1820 what was most complained of against Hunt was, that he, a stranger, convened a mob, but not under any constituted authority, to discuss public affairs. The magistrates of Manchester had circulated printed notices, that the meeting would be illegal, and they stationed constables in a line to be ready to put it down; but the mob chose a place of meeting, which they closed in against the constables, and used exciting banners and large sticks. Hunt, with others, was indicted for an unlawful meeting to excite discontent and disaffection to the Government, and was found guilty.—*L. Abinger, Mem.* 249; *R. v Hunt*, 3 B. & Ald. 566.

In that year, in consequence of these meetings, Lord Sidmouth, premier, complained that, according to the law up to that time, anybody could issue a mandate, summoning all the idle and curious part of the population to attend with martial music, flags, and banners.

¹ 60 Geo. III. c. 6.

² See *post* as to these limits.

³ See 1 Pat. Com. (Pers.) 224.

holding such meetings. Neither the public nor even the parishioners can claim the use of a vestry or vestry hall, for the controul of these buildings is vested in the parson, or the guardians, or overseers of the poor, according as it is part of the parish church or a separate building. They cannot claim the use of the town hall or other room, because that is the property, not of the public at large, but of a municipal corporation, and under the controul of the mayor. Nor can they claim the use of any large building, or even the use of a waste or common, for the freehold as well as the exclusive occupation of such place is always vested in one or a few select individuals. Nor can the public, *qua* public, claim the use of the highway to hold a public meeting, for the soil of the highway is not their property, nor has any portion of them exclusive possession of it. The utmost interest they have in it is merely the right to go and come upon it for purposes of travelling and conveyance of goods, and such minor rights as are incidental thereto. But they cannot claim to stand and meet together there in large numbers, and for a length of time, discussing their grievances, however important these may be deemed. The use of a highway is confined, both by statute and by common law, strictly to the one primary use of a place of passage, and is not for stationary employments.¹ All other uses than that of travelling are deemed abuses, and are usually punishable with a penalty as being wilful obstructions to this right of public passage.²

Right to hold public meetings in public parks.—This difficulty of the public to meet in a public place and discuss what interests them, has been sometimes attempted to be overcome in the metropolis, by resorting to the royal or public parks. But the primary object of these parks, so far as set apart for any definite object, being the recreation of all who choose to resort to them, inasmuch as the holding of public meetings could not be deemed incidental

¹ *R. v Carlile*, 6 C. & P. 637; *R. v Moore*, 3 B. & Ad. 184; *R. v Cross*, 3 Camp. 226.

² 5 & 6 Will. IV. c. 50, § 72. It is not, however, competent for any constable summarily to arrest persons if they choose to meet to discuss public affairs on a highway or street; the mode of procedure is by summons before justices of the peace, unless some local act gives larger powers of summary arrest in that particular district.

to recreation, and as the freehold of these parks, as well as the controul of their possession and use, is vested in the Crown, no public meeting could be held there unless with the permission of the Crown. At the same time, inasmuch as the Crown has for a length of time suffered, and thereby impliedly invited all comers to enter, such as have entered could not be turned out except by first requesting each individual to leave. In this way alone could the license to enter and remain in a park be revoked, and the licensee be turned into the position of a trespasser, and so lawfully ejected. Thus the difficulty of preventing masses of the public from availing themselves of these parks as convenient places for holding public meetings, and thereby abusing the hospitality afforded to them, became conspicuous.¹ They had no legal right to enter, and yet it was all but impracticable without a riot to prevent them. A statute was at last passed in 1872 which recognised the necessity of the public having some portion of a park set aside for such meetings, and for hearing addresses, and thus it succeeded in supplying the want that had been felt.²

Restrictions on public meetings according to subject matter.—While therefore the general rule is, that there is no restriction on the holding of public meetings at any time and place, yet there are one or two exceptions in both these respects caused by the subject matter of such meeting. The occasion and the purpose indeed can neither be dictated nor defined by statute, nor by any public authority, for this reason, that no one can predict

¹ In 1866 the law officers advised the Government that the people could not be turned out of the public park except after notice given to each, and then only sufficient force and no more must be used to expel them. In 1856, also, the Crown was advised, that the parks were in the same position as a private property is, and that the Crown had the same and no greater rights of excluding trespassers.—187 *Parl. Deb.* (3) 215. As to those rights see 1 *Pat. Com. (Pers.)* 304.

² The Parks Regulation Act, 35 & 36 Vic. c. 15. This Act applies to most of the public parks in and adjacent to London. By that Act no person shall deliver or invite others to deliver a public address except in accordance with the rules of the park; and the rules of Hyde Park define convenient places for public meetings. And any person violating the rules, and whose name or residence cannot be ascertained by the park keeper, may be summarily arrested and charged with the offence.—*Ibid.* § 5.

what subject may or may not become of public interest or importance at any given time, according to the events of that time. Hence, as no rule has been laid down, there is practically no prohibition on account of the subject matter, except for blasphemy, immorality, or sedition, to which may be added, as already noticed, that, if any assembly whatever become riotous or unlawful in the sense of pursuing some unlawful conduct and causing terror to bystanders, there is a mode of putting a summary termination to it.¹ Some other grounds, however, of a more special kind must also be noticed.

Public meeting within a mile of Houses of Parliament.—One restriction as to time and place is due to the influence of such meetings on Parliament and Courts of Justice. Thus it was declared by statute in 1817 that no meeting exceeding fifty persons shall be called or held within one mile from the gate of Westminster Hall (except St. Paul's parish, Covent Garden) on any day when Parliament sits, or when a judge of the High Court sits in Westminster Hall, provided such meeting is held for the purpose of petitioning the Crown or Parliament "for alteration of matters in Church or State." If such meeting is called, it is an unlawful assembly. This description, however, vague and sweeping as it seems, does not cover a variety of purposes for which public meetings may still be lawfully called on such days within the prohibited area, and hence all depends on the object of the meeting in question as to how far the statute is violated.² And meetings to elect members of Parliament, or of persons attending on the business of the Courts, were expressly excepted.³

Societies and clubs having unlawful objects and oaths.—While such is the law relating to public meetings

¹ 1 Pat. Com. (Pers.) 224.

² 57 Geo. III. c. 19, § 23.

³ In 1830, when a large multitude, with a tri-coloured flag and banners, accompanied their leaders on the occasion of presenting a petition to William IV. at a levée in the Palace of St. James's, the Lord Chancellor (Brougham) told the House of Lords that there was nothing illegal in this, there being on the occasion no probability of any breach of the peace.—1 *Parl. Deb.* (3) 824. In the House of Commons it was urged by Sir R. Peel to be contrary to 13 Chas. II. st. 1, c. 5. But Lord J. Russell said it was not a petition in the ordinary sense, but only an address of loyalty.—1 *Parl. Deb.* (3) 990. See *L. Mansfield C.J. re Gordon riots*, 1 *Pat. Com. (Pers.)* 237, 239. As to meetings to petition Parliament see *post*, p. 30.

held, to which all the public are invited, it is here necessary to notice that modification of public meetings which consists in considerable numbers of persons meeting, not in public, but rather in secret, though in the exercise of free speech and mutual deliberation. In 1797 all members of societies and clubs which were so constituted, that members required to take an oath or engagement binding them to engage in any seditious purpose, or to disturb the public peace, were declared guilty of felony. And if a member were compelled to take such oath, he was declared to be not free from guilt, unless within four days afterwards he revealed the same to a justice of the peace.¹ And those who take oaths to commit murder or felony are also guilty of felony.² Again in 1799, owing to the number of unlawful confederacies, stimulated by the contagion of the French Revolution, then existing under the name of United Englishmen, Scotsmen, and Irishmen, the London Corresponding Society, and other names, all such societies framed on the principle of taking unlawful oaths of the above description were declared unlawful combinations and confederacies.³ Moreover this statute included all societies whatever having branches or divisions acting under separate presidents and officers. If, however, a society disclose to two justices of the peace the declaration which is required by their members, and this is approved and subscribed by such justices of the peace, this will protect the society against molestation.⁴ And the Act was declared not to affect lodges of Freemasons held according to the rules of their society and registered with the clerk of the peace.⁵ Those who are guilty of joining these unlawful combinations may, upon a summary proceeding within three months after the offence, be committed by justices of the peace to three months imprisonment, or fined 20*l*. And the person who permits such meetings in his house is liable to a fine of 5*l*., and on a second offence to the same punishment as those who actually belong to the society.⁶ And a publican who does the same forfeits his license besides.⁷

Again, in 1817 the legislature thought fit to declare

¹ 37 Geo. III. c. 123. ² 52 Geo. III. c. 104. ³ 39 Geo. III.
^{c.} 79, § 2. ⁴ Ibid. § 3. ⁵ Ibid. §§ 6, 7. ⁶ 39 Geo. III.
^{c.} 79. ⁷ 57 Geo. III. c. 19, § 29.

illegal other combinations, societies, and clubs supposed to be secretly at war with the established government, laws, and constitution of the kingdom, and the members of which take unlawful oaths of secrecy. Such were the Spenceans in 1817, a society whose professed objects were the confiscation and division of the lands and the extinction of the funded property of the kingdom. Such society was declared illegal, as well as all other societies or clubs by whatever name known, which profess the same objects and doctrines.¹ All the societies and clubs of the description first above mentioned were again declared unlawful combinations and confederacies, and those who paid money in aid of them shared their guilt. Nevertheless the societies of Freemasons and Quakers still escaped all liability on being registered.² And societies which assembled only for charitable purposes, and having no other business, were exempted even from this registration.³

Though these laws are still in force, nevertheless, lest proceedings for punishment under them might be abused, a short limitation of time, namely three months, is allowed for commencing proceedings, and no prosecution can be commenced without the leave of the Attorney or Solicitor-General.⁴

Debating societies.—Another form of meeting not quite public, and yet partaking to some extent of the exercise of free speech, is that which is known as a debating society. In 1795 and 1799, the epoch of the French Revolution, it was thought these societies had been used to serve the ends of factious and seditious persons, and stir up hatred and contempt of the Constitution, and a statute forbade every house, field, or place, being kept, where lectures or discourses should be delivered, or public debates had on any subject whatever, also any room for reading books or newspapers, or other publications, to which persons were admitted by payment of money, or by tickets sold for money, unless they were first licensed by Quarter Sessions; and unless so licensed the house or place so kept was deemed disorderly, and every person concerned forfeited 100*l.* Any justice could demand admittance, and even if it were licensed he could also demand admittance, and on refusal could

¹ 57 Geo. III. c. 19, § 24.

² *Ibid.* § 26.

³ *Ibid.* § 27.

⁴ *Ibid.* § 30; 9 & 10 Vic. c. 33, § 1.

read a proclamation, and disperse the meeting, and declare the license forfeited.¹ This continued to be the law until 1863, when such restrictions were utterly abolished.² So that now there is nothing to prevent debating societies being freely held in any locality.

Protection of public meeting against disturbance.—While the power of calling together a public meeting to consider any subject is open to any promoter who chooses to incur what expense may be incidental to the hiring of a room for that purpose, nevertheless such meeting when called is subject to the same controul on the part of the promoter, as if he were entertaining them in his own house. It is only called public, because large numbers are usually invited, or if conditions are annexed, these conditions are at most easily complied with, such as by payment of a small sum of money ; and no further discrimination of persons is made except such as fulfils the description of the invitation. But when the meeting is called, and the business is going on, the public, or those of them who attend, have no rights as against the promoter who hired the room, and who is master of the situation, and can dictate the proper mode of managing the business. The chairman is nothing but a person elected to be either the mouthpiece of the manager or who by his consent is accepted as such on the nomination of the meeting, and is presumed to act in accordance with the object in view. In that sense, and so long as he is the accepted referee and agent of the promoters, whatever course he takes must be submitted to by the audience, subject to such comment as he may allow. The public have been merely invited, and to that extent have a lawful right to attend ; but this gives them no absolute right of any kind, either to speak or take part in the business, unless invited by the chairman to do so. If any person insist on speaking, or on speaking too long, it is always in the power of the chairman, as the agent of the promoters, who are the legal occupiers of the room for the time being, to request such person to desist, or to leave the room ; and if after request such person refuse to leave, then he may be ejected with just enough of force and no more to overcome his resistance. And if

¹ 36 Geo. III. c. 8, § 12 ; 39 Geo. III. c. 79, § 15.
Vic. c. 24. As to Sundays, see *post*.

² 32 & 33

in course of this process an assault be committed, the mutual rights of parties to push or to resist must be adjusted on the footing, that the chairman as the agent of the promoters was entitled at any moment, and without stating any reasons, to request any person present to leave the room, and if that person refuse to leave, he becomes thereafter a trespasser. It is true that even a trespasser cannot be assaulted: he must first be requested to withdraw, and such force as may be necessary to put him out must then be used, not by way of punishment, but simply and solely to carry out with the least possible violence the design to get rid of him. And for a like reason, inasmuch as the promoter, by means of the chairman, is entitled to the exclusive occupation of the room, even though he acted with gross unfairness, or in breach of the common understanding of the invitation, he is nevertheless equally entitled to enforce his will, for as the whole business was based on a mere invitation and hospitality, and not on any contract, there can be no breach and no cause of action. The only remedy of those who are dissatisfied is to hold a meeting of their own at another time and place, and under a management more to their liking.¹

Thus at a temperance meeting of about 200 persons, of which the defendant was chairman, while an orator was telling the audience that, if a man drank water his nerves would be as hard as iron, and he would be as strong as an elephant, the plaintiff, one of the members, shouted out, "Yes, as a dead elephant," which sally created laughter and some disturbance. The defendant called in a police-constable and gave the plaintiff in charge for disturbing the meeting, and insisted on the constable taking the plaintiff to prison and then before a magistrate, who dismissed the charge. For this false imprisonment the plaintiff recovered 5*l.* damages, because the defendant ought to have merely ejected the plaintiff, and done nothing more, seeing that the disturbing of a meeting is no criminal offence such as authorises arrest or imprisonment of any kind.² In another case the plaintiff, being at a meeting

¹ *Howell v Jackson*, 6 C. & P. 723.

² *Wooding v Oxley*, 9 C. & P. 1. If the plaintiff had struck any one, then he might have been given into custody to a constable who saw such a breach of the peace.

of the Church Liberation Association, and a disturbance arising near him, was suddenly seized by a man with a white ribbon in his coat, and two constables, and dragged over some benches to where the defendant, who was chairman, sat. The plaintiff, who had received injuries by this treatment, sued the defendant for damages; but at the trial there was no evidence, that the three who arrested the plaintiff stood in the relation of servants to the defendant, or received any particular instructions from the defendant to make the arrest. All that the defendant had said was, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." These words were construed not to amount to a definite order to seize the plaintiff, nor was there evidence of any instructions equivalent to this; and so the plaintiff was nonsuited. The plaintiff had obviously sued the wrong person, or had failed to procure sufficient evidence of previous instructions, so as to connect the defendant with the injurious act committed by those assisting in keeping order.¹ In another case various persons had conspired to disturb a meeting held by the Magna Charta Association to hear a lecture on a disputable question, and had been guilty of turbulent conduct both during and after the meeting. An application was afterwards made to the justices for a summons charging them with conspiracy; but the justices, without denying that the evidence of the disturbance was credible, declined to hear the case. The court held that they were bound as justices to hear the application, and though they had a discretion as to issuing the summons, yet they must at least hear the witnesses, in order to be able to exercise that discretion rightly.²

Restrictions on places for lectures and addresses.— Closely connected with the right of holding public meetings is that which may be called the right of lecturing and addressing large audiences; for this is always a powerful and rapid mode of influencing public opinion. As, in the case of public meetings, any person from the crowd may take on himself the office of promoter, and thereby be the manager of the meeting, so any one from the crowd, if he believes that people will listen to him, may take on

¹ Lucas v Mason, L. R. 10 Exch. 251.
1 Q. B. D. 201.

² R. v Adamson,

himself the office of delivering to them an address, and he may prescribe his own terms and dictate his own invitation. There was a restriction on this right imposed in 1789 as already noticed, in consequence of the tendency of such meeting to spread sedition and immorality. That restriction, indeed, applied only when admittance was not free, and the house and the subject required the previous license of two justices of the peace, who had also power to demand admittance and interfere.¹ These enactments were, however, repealed in 1869,² and now, subject to the law of trespass, there is no restriction whatever so far as time or place or any preliminary license is concerned, except so far as the limits of all free speech and thought, defined under the heads of blasphemy, immorality, and sedition are concerned, to which sometimes also slander may be added, and occasionally even a riot may be apprehended as a not improbable accompaniment.³

Right to petition Crown and Parliament.—When a legislature is recognised in any civilised country, all the citizens, for whose benefit that legislature exists, are necessarily interested in making it acquainted with the grievances which from time to time are discovered, so that it may exercise the fullest judgment as to the appropriate remedy. In the best governed countries of the world the law is perpetually undergoing a process of decay and reconstruction. The sooner much of it is recast the better, for it is always in arrear of the standard of excellence which the most experienced and wisest see in prospect; but there is often great difficulty in fixing on the best amendment or the best substitute, and this last can only be divined by first attaining a complete knowledge of the evils to be confronted and overcome. This knowledge can usually

¹ 39 Geo. III. c. 79, §§ 15, 18. ² 32 & 33 Vic. c. 24, sched. i.

³ Sometimes the subject chosen by the lecturer is such as to excite the audience and lead to riot or disorderly conduct; but this apprehension can seldom be used so as to prevent the lecture being held. Where, for example, a noted lecturer who was likely to create disturbance by violent language, as he had done at previous meetings, had advertised a lecture, it was found that there was no means of preventing him on that account holding his lecture, though it might be prudent that the military should be kept in readiness by the municipal authorities, in order to secure protection against probable contingencies.—198 *Parl. Deb.* (3) 618.

come only from those who have been actually aggrieved, and who can impart to their physicians a precise description of their malady. Hence it arises, that the right of petitioning the Crown and Parliament, who preside over the springs of action, and so making both fully acquainted with the desired redress, is an essential part of liberty. It implies mutual confidence and alacrity in the desire to perfect the law, which is the great working machine of government, and the efficiency of which ought to bespeak perpetual interest and vigilance on the part of all alike. It would be singular if in England it had not been early discovered, that this right of petitioning was so valuable that no obstruction to it could be tolerated. At every stage of progress it must have been a leading desire that the governed, unless they were accustomed to abject slavery and blind obedience, should ardently seek for every opportunity of reaching the ear of their governors; and though the same want must be felt under every government in the world, how much more so must it be felt under one which has been the fruit of original contract, or which at least, in the best epochs of its history, bears the mark of mutual and intelligent assent on the part of governors and governed alike—which is based on the accepted axiom, that it is the duty of the one to hear quite as much as it is the duty of the other to obey.

A glimmering of the value of this right of petitioning was visible in early times.¹ In 1647 mobs of apprentices

¹ One of the crimes for which the De Spencers were banished in 1321 was their hindering King Edward II. from receiving and answering petitions, and preventing good counsellors advising and speaking with him.—15 Ed. II. And one of the articles against Lord Strafford was, that he issued a proclamation restraining the subjects from carrying their complaints of wrongs and oppression to the fountain head. In the time of the three Edwards, however, the right of petitioning the Crown was recognised as the usual mode of redress for private injuries, there being at that period nothing but the loosest notions of jurisdiction.—*Magn. Ch.* (Joh.) c. 44; *Ibid.* (Hen. III.) c. 29; *Rot. Parl. temp.* Ed. I.; Ed. III. Petitions to Parliament were also early adopted, though till the end of the reign of Richard II. it is said none were addressed separately to the House of Commons. These petitions embraced every variety of grievance. And to enable a selection to be made of those petitions, which were properly submitted, certain Receivers and Triers of Petitions were appointed.—*Parry's Parl.* 66. And this practice is still continued

invaded the lobbies of the House of Commons in a disorderly way, while presenting their petitions, hustling the Speaker, and forcing him back into his chair.¹ And this showed that the law was not sufficiently defined in this particular respect.

Statute relating to meetings to petition Crown and Parliament.—The evils of tumultuous petitioning increased, and a statute was required to check it. The Act of 1661 enacts that none shall solicit the consent of more than twenty persons to a petition to the King or either House of Parliament for alteration of matters established by law in Church or State, unless the matter thereof have been first consented to or ordered by three justices of the peace, or the grand jury at Assizes or Quarter Sessions, or in London by the Common Council, and no person shall present any petition accompanied by more than ten persons under a penalty of £100 and three months imprisonment. Provided that this Act shall not hinder any number of persons, not exceeding ten, from presenting any public or private complaint to any members of Parliament, or to the king, for any remedy to be therein had.²

Subject matter of petitions to Parliament.—So much did the House of Commons encourage petitions of grievance that at the beginning of every new parliament they appointed one grand committee for grievances and another for courts of justice, and both were appointed to sit in the House once a week.³ But this practice was discontinued in 1832. In the "Case of Jurisdiction 1666" it was solemnly

in the House of Lords in point of form.—*Hales' Jurisd.* H. L. c. 12; *May's Parl.* (8 ed.) 560. Each House, however, now dispenses with any select classification of petitions. The practice of petitioning on political or general subjects did not become usual till the time of the Great Rebellion, and the three reigns following.—2 *Clar. Hist. Reb.* 225, 348; 5 *Rushw. Coll.* 459.

¹ 3 *Parl. Hist.* 718, 722.

² 13 Ch. II. st. 1, c. 5. The words "solicit the consent" have been understood to mean soliciting the signature. The words "alteration of matters in Church and State" are loose, and lead to an absurdity, for in strictness nearly every possible petition must solicit one or other of these things, and Parliament is constantly altering matters in Church and State, and it must always be right to ask Parliament to alter these.

³ *Com. Journ.* 13 Nov. 1731.

resolved, that "it is the inherent right of every Commoner to present petitions to the House of Commons in case of grievance, and of that House to receive them. That it is the right of that House to determine how far such petitions are fit or unfit to be received, and that no court has power to censure a petition to the House of Commons unless transmitted from thence."¹ Again, in 1680 the House of Commons resolved, that "it is and ever hath been the undoubted right of the subjects of England to petition the king for the calling and sitting of Parliament and redressing of grievances. To traduce such petitioning is a violation of duty, and to represent it to his majesty as tumultuous and seditious, is to betray the liberty of the subject, and contribute to the design of subverting the ancient legal constitution of this kingdom and introducing arbitrary power."² And a member was expelled for presenting an address to the Crown expressing an abhorrency to petition for the calling and sitting of Parliament. In the same year the House of Commons committed two foremen of grand juries and ordered to be impeached three judges, for expressing detestation or contempt of the right of petitioning.³ The Bill of Rights deemed it of sufficient importance to reiterate an express declaration, that "it is the right of the subject to petition the king, and that all commitments and prosecutions for such petitioning are illegal."⁴ In the case of Lord George Gordon it was contended, that the statute of Charles II., so far as imposing restrictions upon petitioners going to Parliament, was repealed by the Bill of Rights,⁵ and that the right was by the later Act made absolute and without impediment; but the court held that the former act was not so repealed.⁶ The court also said the questions for a jury in

¹ Skinner's Case, 6 St. Tr. 765.

² 4 Parl. Hist. 1174.

³ 5 Parl. Hist. App. No. 18. Yet the form of a petition to the king must not be allowed to cloke a scandalous censure of a judge or court as was the case of Wrenham, who slandered Lord Chancellor Bacon for making a decree against him.—*Wrenham's Case*, Hob. 220. And the Star Chamber fined him 1,000*l*. The seven bishops were tried and acquitted on an information for a like offence, namely, under the guise of a petition to King James II., publishing a seditious libel by questioning the dispensing power.—*R. v Seven Bishops*, 12 St. Tr. 183.

⁴ 1 W. & M. Sess. 2, c. 2.

⁵ *Ibid*.

⁶ *R. v Gordon*, Dougl. 592; 21 St. Tr. 485

all cases of any violation of this right were (1) whether the multitude did assemble and commit acts of violence with intent to terrify, and compel the legislature to repeal an act, and (2) whether the prisoner incited, encouraged, or assisted in the insurrection.¹ The result, therefore, is, that the act of Charles II. being in force, though it prohibits the soliciting of more than twenty signatures to a petition, yet does not punish those above that number who actually sign, and no sound reason could be shown against the greatest possible number of signatures. Though petitioners actually present, exceeding ten, might appear intimidating, yet the same objection is not applicable to signatures, which in any number cannot practically be prevented or punished. Such a restriction would obviously infringe upon natural liberty, and must be strictly construed.²

Petitions to the Crown and Parliament must be respectful.—But while the right of petitioning either House of Parliament or the Crown is undoubted, it is equally the rule, that such petition must be respectful, and moderately expressed. As to what will be construed as an insulting or disrespectful address, the opinions of one age may differ widely from those of another; and the tendency of modern times has generally been to allow the fullest latitude to every honest expression of opinion on any subject, so long as the words are not libellous or abusive.³ It is difficult to prescribe a limit to the subject matter of these petitions. It is not likely that the people will often abuse the right of petitioning, so much as they did in Charles II.'s time, by praying, that no more Parliaments may be assembled.⁴ The Kentish petition of 1701 was a notable example of using language too bold or overbearing for any Parliament to receive with equanimity, and some of the

¹ *R. v Gordon*, Dougl. 592; 21 St. Tr. 485.

² As ERSKINE remarked, "in the Bill of Rights the right of assembling and petitioning had been a right claimed with such firmness, and contended with so much glorious struggle, that it was not to be exercised only with the permission of magistrates or even of the king himself."—32 *Parl. H.* 312.

³ In 1830, when a man Carlisle presented a petition in favour of emancipation of the Jews, and offered to prove at the bar what he therein stated, namely, that the Jews did not murder our Saviour, it was rejected.—25 *Parl. Deb.* (2) 412.

⁴ 16 *Parl. Deb.* 811. Lord North, in 1799, asserted that a petition for a dissolution of Parliament was unconstitutional.—*Ibid.*

signatories to it were committed ; and yet on that occasion it was experienced, how seldom it is politic in Parliament to be fastidious in scrutinizing the language of any people suffering under a grievance, even if it be imaginary.¹

The petition of Lord George Gordon in 1780 was too rudely presented, and was accompanied with violence.² In 1848 a great Chartist meeting in London was declared by proclamation to be illegal, but the meeting was held peaceably, and as its fruit a petition was presented with 1,900,000 signatures.³ In 1866 a great meeting of the Reform League in Hyde Park was declared by the Govern-

¹ The Kentish Petition of 1701 stated: "Whatever power is above law is burdensome and tyrannical, and may be reduced by extra judicial methods. You are not above the people's resentments ; they that made you members may reduce you to the same rank from whence they chose you, and may give you a taste of their abused kindness in terms you may not be pleased with. Voting a petition from the gentlemen of Kent insolent is ridiculous and impertinent, because the freeholders of England are your superiors. Suffering saucy, indecent reproaches upon his Majesty's person to be publicly made in your house, particularly that impudent scandal of Parliaments, John How, without showing such resentments as you ought to do. This is making a Billingsgate of the House, and setting up to bully your sovereign."—5 *Parl. Hist.* 1254. The petition was presented 6th May. The House ordered five of the signatories to be arrested, and they were imprisoned with harshness by the sergeant-at-arms. The prorogation took place on 23rd June, when they were discharged. They were afterwards entertained at a banquet by the Mercers of London ; and when they went home to Kent 500 horsemen welcomed them. The people scattered flowers before them, lighted bonfires, and rang the church bells.

² Lord George Gordon called a public meeting to petition against a supposed Popish Bill. Ten thousand met, and though he preached peace and order, they insisted on attending him to the House of Commons, where they resorted to acts of violence.—*Lord Abinger, Mem.* 267. They swarmed in the lobbies and interrupted the House of Commons by loud knocks at the door, and they seemed on the point of bursting in, so that members were preparing to cut their way out with their swords. During the motion to entertain the petition Lord George frequently left the House to report the progress of the debate to the mob, thereby exciting them. The king, on the advice of Wedderburn, A.G., took the responsibility of issuing a proclamation, irrespective of the Riot Act, and ordering 10,000 troops to act, and they acted within a few hours on the fifth day of the riots. Lord George Gordon was tried for treason but acquitted. Nearly three hundred lives were lost in the process of the Life Guards dispersing the mob.—2 *Massey's Hist. Eng.* 458.

³ H. C. 10 Ap. 1848.

ment to be illegal; but a mob nevertheless met riotously, and were only dispersed by the military; and ultimately a part of the park was by statute assigned for the holding of such meetings peaceably.¹ The Houses of Parliament have often shown great displeasure at receiving petitions aimed against their own constitution, and representing it as corrupt or faulty.²

¹ 23 July, 1866; 6 May, 1867. See *ante*, p. 23.

² When Sir F. Burdett, in 1810, was sent to the Tower by the House of Commons for libelling the House in the form of a legal argument against the power of the House to imprison persons not members for libels, a Middlesex petition was presented reminding the House of its having grossly violated the rights of the country in the case of Wilkes, and afterwards expunging all its resolutions as subversive of the rights of electors; and the petitioners, protesting against this exercise of power, asked the House to expunge all its resolutions as to Burdett. The House went into debate as to whether the petition was not too disrespectful, insulting, and dictatorial to be received, and resolved by 139 to 58 not to receive it.—16 *Parl. Deb.* 818. A petition from the Livery of London was also rejected, owing to its insulting tenor, though couched in the form of "humbly observing and declaring."—*Ibid.* 943. On the other hand, a petition from Westminster, which city Sir F. Burdett represented, and praying the House to reconsider the censure of their representative and restore him as their representative, and take the state of the representation of the people into serious consideration, was also objected to by some, but admitted by the House.—16 *Parl. Deb.* 728.

A petition had once before been presented praying to be allowed to prove that seats for legislation in the House of Commons were as notoriously rented and bought as the standings for cattle at a fair, and the petitioner was threatened with punishment for this scandalous libel.—16 *Parl. H.* 887.

On one occasion a petition was presented to the House of Lords, praying—in consequence of the course taken on several then recent occasions, when the bishops had shown such utter forgetfulness of the spirit of their religion—that the Act of Charles II. may be repealed, whereby the bishops were restored to the exercise of legislative functions. The Lord Chancellor said, that any petition, if respectfully worded, should be received; but the only valid objection to this petition was that it assumed a knowledge of how the bishops had voted, which could only be attained by breach of privilege. Another lord objected, that no petition should be received, praying that the spiritual peers should be excluded, as the next petition might pray that all the other peers should be excluded, and a third petition that the Crown should be taken from the sovereign's head. The petition was withdrawn.—A.D. 1833; 19 *Parl. Deb.* (3rd) 1083. In one case, in 1821, a man tried for blasphemy presented a petition to the House complaining that he had been fined three times in the course of defending himself, and the fines amounted to 100l.

It is also difficult to guard against fraudulent practices used in procuring, or even forging signatures, in order to enhance the importance of the petition ; but each House of Parliament treats as a breach of privilege the act of those who set down without authority the name of any other person to a petition, and has sometimes committed the perpetrators of the fraud to prison.¹

The petitioner had prepared a long written defence on his trial, and, when stopped, once or twice used insolent words to the judge ; and in his petition insinuated that the judge had imposed the fines to obtain a conviction. The House refused to receive his petition, but a large minority urged that the right of petitioning ought not to be discouraged, however strong may be the language used by the petitioner when defending his interests.—*Re Davison*, 4 *Parl. Deb.* (2nd Ser.) 931 ; 4 B. and Ald. 329.

¹ May's *Parl.* (8th ed.) 564. A petition to the House of Lords was once rejected for omitting the word "humbly."—40 *Parl. Deb.* 1270.

CHAPTER III.

FREEDOM OF THE PRESS AND OF CORRESPONDENCE BY POST.

Liberty of the press, and its definition.—The liberty of the press means the liberty of publishing whatever any member of the public thinks fit on any subject without any preliminary license or qualification whatsoever, and subject only to this restriction, that if he goes to an extreme in making blasphemous, immoral, seditious, or defamatory statements, then he may be punished afterwards by indictment, information, or by action for such excess. Hence it is obvious that until one knows what are the excesses which the law deems blasphemy, immorality, sedition, or libel, he cannot fully comprehend the extent of liberty he may enjoy.¹ These are but the mere negative

¹ “ Though the liberty of the press is in everybody’s mouth I am afraid there is nothing less understood than the nature of that liberty. It is by most people taken for a liberty to publish every indecency of any kind against the most respectable persons and the highest characters ; and so strongly does this notion prevail, that a libeller is no sooner prosecuted than a cry is immediately set up that the liberty of the press is endangered. But if the liberty of the press consists in defamation, it were much better we were without any such liberty. The laws and institutions of England know of no liberty peculiar to the press of publishing to the world any defamatory matter to the prejudice of superior, inferior, or equal. That would be a liberty destructive of all laws and all constitutions. The liberty of the press is the liberty to communicate at an easy expense one’s labours and thoughts upon any subject to the whole world ; but it can never be understood as any liberty which the press acquired and which was unknown before the discovery of printing. Whoever attempts to attack any man’s character, by writing or publishing defamatory libels, is guilty of a trespass, and can plead no mitigation of his crime either from the nature of our

restrictions, indicating like finger-posts the forbidden corners beyond which he cannot travel with impunity. But a very little reflection will at the same time teach him, that everything that is interesting to man, every kind of speculation on matters of religion, politics, science, philosophy, or practical life can be discussed with perfect freedom, without the writer being either blasphemous, immoral, seditious, or libellous. To steer clear of these rocks and quicksands requires the same experience and knowledge which pilots and all other skilled workmen require in their daily avocations. Yet the vast range of ocean open to the navigator is so great in proportion to the spaces shut out, that the positive enjoyment represented by the liberty of the press is not only the most intense and sensitive of which a citizen is capable, giving scope to his noblest faculties, and bringing within range his most far-reaching powers, but the restrictions fall into insignificance, and are altogether inappreciable.¹ These restrictions, as will be seen, are necessary for the protection of all other fellow citizens who claim equal rights, and have their own affairs to further and protect, and who would otherwise be molested in their own separate pursuits. And hence the liberty of the press in its history and its results is the best of all illustrations of

constitution or the tenor of our laws, because a great part of our laws are intended for the relief of any person who is injured by another."—*Lord Hardwicke, L. C. 10 Parl. Hist. 1330.*

¹ "The greatest enjoyment that rational and sociable creatures are capable of is to employ their thoughts on what subject they please, and to communicate them to one another as freely as they think them; and herein consists the dignity and freedom of human nature, without which no other liberty can be secure. For what is it that enables a few tyrants to keep almost all mankind in slavery, but their narrow and wrong notions of government, which is owing to the discouragement they lie under of mutually communicating, and consequently of employing, their thoughts on political matters, which did they do, it is impossible that the bulk of mankind should have suffered themselves to be enslaved from generation to generation. But the arts of state, in most countries, being to enslave the people or to keep them in slavery, it became a crime to talk, much more to write, about political matters; and ever since printing has been invented there have been in most places state licensers, to hinder men from freely writing about government, for which there can be no other reason but to prevent the defects of either the government or the management of it from being discovered and amended."—*5 Parl. Hist. Apx. No. 13.*

the definition of the law already given, namely, "the sum of the varied restrictions on the actions of each individual which the supreme power of the state enforces in order that all its members may follow their occupations with greater security."

The civilisation of one country differs from that of another in so far as it dispenses with any preliminary license, and narrows and makes more definite, clear, and reasonable the restrictions that require in some form or other to be maintained. It cannot be denied that like restrictions are necessary in all countries, for there are times when an envenomed scurrility against everything sacred and civil, public and private, rages throughout the kingdom with a furious and unbridled license.² These hurricanes may, it is true, after a time clear the air. And this whole chapter of the law is founded on the fundamental truth, settled after centuries of misguided zeal and energy, that thought and speech are beyond the reach of all governments and laws, and cannot be extinguished or dictated to except at the expense of life itself—that therefore it is idle, impotent, and vain for the law to attempt to do what is impossible, and that it is the highest wisdom to confine itself to the narrower province, of regulating by the smallest number of restrictions the enjoyment and exercise of this natural illimitable force.

The basis of the liberty of the press is thus what a master of the subject has well pointed out:—"Every man not intending to mislead, but seeking to enlighten others with what his own reason and conscience, however erroneously, have dictated to him as truth, may address himself to the universal intelligence of a whole nation, either upon the subject of governments in general, or upon that of his own individual country. He may analyse the principles of its constitution—point out its errors and defects—examine and publish its corruptions—warn his fellow-citizens against their ruinous consequences, and exert his whole faculties in pointing out the most advantageous changes in establishments which he considers to be radically defective or sliding from their object by abuse. All this every subject of this country has a right to do, if he contemplates only what he thinks would be for its

¹ 1 Pat. Com. (Pers.) 27.

² Burke, Pres. Discont.

advantage, and but seeks to change the public mind by the conviction which flows from reasonings dictated by conscience."¹

Liberty of the press the greatest of all liberties.—The liberty of the press as thus understood has been described as the palladium of the constitution, and as that which will command an audience when every honest man in the kingdom is excluded;² as Lord Camden said, it is the greatest engine of public safety;³ and to which, as Fox said, the modern improvement in the science of government was entirely owing,⁴ and indeed to which it is owing in a great measure that we enjoy any liberty at all.⁵ The freedom, with which skilful writers can animadvert on the conduct of all public men and public measures, acts as a check on every kind of misgovernment, and baffles most of such attempts sooner or later. It gives dignity and a sense of security to the whole people when they know that some champion will be forthcoming or is ever on the alert, able to meet all comers, whenever an abuse is discovered, a grievance felt, or an evil is to be redressed, and that there is no machinery by which any interested party can be sure of enforcing absolute silence. Though Parliament at first misunderstood the power of the press, and like other powers, feared some new rival, yet when these great engines are allied, it is seen how they are the complement of each other, and that neither could put forth half its strength without the other being ready to second it. The power of

¹ *Erskine, arg., R. v Paine*, 22 St. Tr. 357. "There is one country (England) where man can freely exercise his reason on the most important concerns of society, where he can boldly publish his judgment on the acts of the proudest and most powerful tyrants."—*Sir J. Mackintosh, R. v Peltier*, 28 St. Tr. 529. "The liberty of the press—that sacred palladium which no influence, which no power, no minister, no government—which nothing but the depravity, or folly, or corruption of a jury can ever destroy."—*Curran, arg., R. v Rowan*, 22 St. Tr. 1087.

² Junius, Pref. ³ L. Camden, 29 Parl. Hist. 731. ⁴ C. J. Fox, 29 Parl. Hist. 553.

⁵ L. Talbot, 10 Parl. Hist. 1333. See also eulogies of Milton, Areop.; 1 Macaulay, Hist. c. 10, quoted 1 Pat. Com. (Pers.) 62. QUETELET ("Sur l'homme," 289) said, that the press tends to deprive revolutions of their violence by hastening the period of reaction.

each is at least immeasurably enhanced by calling in aid the other as its natural ally.¹

The ancients on free speech and thought.—The liberty to speak and think was confined in early times within narrow limits by the mere mechanical conditions incident to the small audiences on which any one human voice was necessarily spent; and by the difficulties attending the circulation of writings as articles of property.²

¹ "English freedom," as Fox observed, "does not depend upon the executive government nor upon the administration of justice, nor upon any one particular or distinct part, nor even upon forms, so much as it does on the general freedom of speech and of writing. Speech ought to be completely free. The press ought to be completely free, when any man may write and print what he pleased, though he is liable to be punished if he abused that freedom. This is perfect freedom. If this is necessary with regard to the press, it is still more so with regard to speech." "I have never heard of any danger arising to a free state from the freedom of the press or freedom of speech: so far from it I am perfectly clear, that a free state cannot exist without both. It is not the law that is to be found in books that constitutes—that has constituted the true principle of freedom in any country at any time. No, it is the energy, the boldness of a man's mind which prompts him to speak not in private, but in large and popular assemblies, that constitutes, that creates in a state the spirit of freedom. This is the principle which gives life to liberty; without it the human character is a stranger to freedom. As a tree that is injured at the root, with the bark taken off the branches, may live for a while, and some sort of blossom may still remain, but it will soon wither, decay, and perish, so take away the freedom of speech or of writing, and the foundation of all your freedom is gone. You will then fall and be degraded and despised by all the world for your weakness and your folly in not taking care of that which conducted you to all your fame, your greatness, your opulence, and prosperity." —*C. J. Fox. H. C. 1795, 32 Parl. Hist. 419.*

"Give me but the liberty of the press, and I will give to the minister a venal House of Peers. I will give him a corrupt and servile House of Commons. I will give him the full swing of the patronage of office. I will give him the whole host of ministerial influence. I will give him all the power that place can confer upon him, to purchase up submission, and overawe resistance; and yet, armed with the liberty of the press, I will go forth to meet him undismayed—I will attack the mighty fabric he has raised with that mightier engine. I will shake down from its height corruption, and bury it beneath the ruins of the abuses it was meant to shelter." —*Sheridan, H. C. (1810), 15 Parl. Deb. 341.*

² The mode in which Atticus used to collect books was by employing his slaves to go and copy them; and copies were thus made also for sale, for the common profit both of the slave and the master.

But when the art of printing was discovered, and it then became apparent, that the audience grew from hundreds to thousands, and the voice penetrated to the market, the barracks, the cloister, the plough, and the loom, and every abode from the palace to the hut, and covered continents instead of one small chamber, governments became perplexed how to deal with this new force, the mischiefs of which were at first only discerned, and these in exaggerated proportions. Even the ancients indulged in some maxims which had an air of liberality and foresight. But this was chiefly because the difficulty to be confronted had not then really arisen.¹ Their thoughts, therefore, on all that concerns the liberty of the press are trifling and inadequate. They had a vague notion that people might think and speak very much as they liked, but this was coupled with the certain knowledge, that the audiences must be always small, and incapable of leading to combination and resistance without their beginnings and stages being visible and easily checked. Their practice as to blasphemy will be found quite as intolerant as those of any of their successors, and their false gods were protected as jealously as if they were true.

Early restrictions as to number of printers.—At first printing was treated like the making of sal ammoniac, and apprentices were cautioned not to lay open the principles to the unfaithful.² After the invention of printing came to be understood and practised, governments at first bethought themselves of the expedients in their power wherewith to controul it; and two things at first seemed wise and indispensable. The first was to limit the number of printers; and the second was to see, that nobody

—*Middleton's Cicero*, 136. In the time of our Henry II. a like office was done by monks, scribes, and illuminators.

¹ It was remarked that Augustus was the first to keep his eye on defamatory libels, owing to Cassius Severus being accustomed under feigned names to deal freely with public characters. Yet Tiberius used to say that in free states both the tongue and the mind must be free.—*Suet. Tib.* It was said that in Trajan's time, as his highest praise, every man might think what he pleased, speak what he thought, and that the only persons who were hanged were the spies and informers, who used in former reigns to make it their trade to discover crimes.—*Tacit. Hist. b. i.*

² *Becket v Denison*, 17 Parl. Hist. 958.

presumed to publish anything, until an archbishop or high functionary first satisfied himself that the foundations of the terrestrial economy would not be shaken to their centre by the explosion.¹ And these crude and barbarous notions were mixed up with a still more confused and half understood theory of copyright. The period of the Reformation opened up men's minds and made them think, and after thinking they published their thoughts plentifully. The statute of 1533 recited that a marvellous number of printed books had been brought into the realm since the statute allowed aliens to print them as well as import them, and to encourage native industry foreign bound books were thenceforth prohibited to be imported or bought from foreigners; and the Lord Chancellor, Lord Treasurer, and two Chief Justices were to regulate the price of books, as well as of the binding of them.² The Crown seemed to assume as a matter of course, that no subject had any business to think or publish his thoughts without its license. Hence Edward VI. appointed by patent a printer who was to print and sell all Latin, Greek, and Hebrew books, as well as all others that might be commanded, and penalties were denounced against infringers.³ In Queen Elizabeth's time there was still a complaint of the excessive number of presses.⁴ In 1637 the Star Chamber, which

¹ "The press being introduced into this country by Henry VII., an opinion prevailed that it was part of the prerogative of the king to govern it, and that opinion was not eradicated for many ages. This was perhaps not unnatural, the press being introduced by the king and the art of printing being by his munificence communicated to his subjects, and he having at first licensed certain persons only to print."—*Scarlett, arg., R. v. Burdett, L. Abing. Mem.* 297.

² 1 Rich. 3 c. 9; 25 Hen. VIII. c. 15. This latter statute was supposed to be really aimed at keeping out the Lutheran books. In France also, in 1533, the Sorbonne petitioned Francis I. that to save religion it was necessary to abolish for ever, by a stern edict, the art of printing.—*Rapport, Lib. de la Presse*, 1879.

³ 4 Herbert and Ames, 1 (Dibd. ed.)

⁴ In 1585 Whitgift obtained an order of the Queen that there should be no printing-press except in London and the two Universities; and no book should be printed that had not been read by the Archbishop or Bishop of London or their chaplain.—1 *Neal's Purit.* 369; *Strype's Whitgift*, 223. And yet private and travelling presses were not unknown at that time, as was obvious from the trial of Knightley, who favoured the Puritan party in attacking the Church of England.—2 *Camden, Eliz.* 550; 1 *St. Tr.* 1271. It was near the

never hesitated to assume the most preposterous powers, issued a decree to regulate the press. Those who printed books, not being qualified, were to be sentenced to whipping, the pillory, and imprisonment. Books imported were first to be examined by the archbishop and bishop, who had power to seize all seditious, schismatical, or offensive productions. The Long Parliament, in 1645, following in the same track, passed a most tyrannical ordinance to repress disorders in printing, and they authorised doors to be broken open day or night to search for unlicensed printing-presses, authors, and binders. At last all this floating extravagance and confusion of ideas came to a head not long afterwards. The Licensing Act of 1662 was an elaborate exposition of the views of the legislature with regard to the position of the press, and nearly every point of its crude details has since been reversed.¹ This Act was

middle of the eighteenth century before printing, which had previously been confined chiefly to London, became generally practised in country towns.—*Gent's Life*, 20.

¹ The Licensing Act of 1662 prohibited the publication of seditious and heretical books, pamphlets, and papers. No person was to print any book, unless it was first entered with the Stationers' Company, and unless duly licensed and authorised. And this license, if the book was concerning the laws, was to be granted by the Lord Chancellor or a chief justice: if concerning history, by a Secretary of State: if concerning divinity, physic, philosophy, or science, by the Archbishop of Canterbury or Bishop of London, with a saving in favour of the Universities for their own publications. The license was to be printed at the beginning of the book. No book was to be imported without episcopal license. No person was to print or import books without the consent of the person who, by virtue of letters patent granted or assigned, or by virtue of an entry in the Stationers' Company's books, or in the University register book, has the right solely to print. No person was to print a book without putting his name thereto, and being liable to declare the name of the author also. No one was to sell books without a license of the bishop, and without serving an apprenticeship. No one was to keep a printing-press, or even to make one, or to make type, without first giving notice to the Stationers' Company. There were to be no more than twenty master printers, and these were to be licensed by the archbishop or bishop, and each was to be bound in a recognisance of 300*l*. None was to keep more than two printing-presses without license. The master printers were bound to employ all journeymen printers, except foreigners, on application; and if the latter refused to work, they were to have three months imprisonment. A king's messenger, under a warrant of a Secretary of State or Master of the Stationers' Company, might, with a constable, at

continued by various Acts, the last of which, 1 James II. c. 17, § 15, continued it for seven years, from 24th June, 1685, and to the end of the next session of Parliament; and accordingly in 1692 it finally expired.¹

The rule meanwhile was boldly laid down and acted on, that the king at common law had a prerogative to govern the printing-press, and that this was necessary to religion and the conservation of the public peace, and that no author could publish any book without first getting his license; the doctrine being, that the printing of a book was like building a castle, and no man could make sea-marks or beacons without license,² and "a book might rouse as great a dust and alarm as a beacon."³ And it was solemnly declared, that matters of state, and things that concern the government, could not safely be left to any man's liberty to print. In 1666 an Order in Council directed the Stationers' Company to seize and deliver up to the Secretary of State all copies of Buchanan's *History of Scotland* as pernicious to monarchy and injurious to his Majesty's blessed progenitors.⁴

Restrictions on printers as to keeping copies and putting their names on papers.—It thus appears that when printing came to be first practised in this country,

any time he thought fit, search all houses and shops, except the houses of peers, where they suspected books to be printed and bound, or presses to be kept without license, and seize books and offenders, and put the latter in prison till trial. And if the searchers found a book which they thought contrary to the doctrine of the Church of England, or against the Government, such book was to be taken to the Bishop or a Secretary of State.—14 Ch. II. c. 33.

By one of these Licensing Acts of 1665 every printer was bound to present three copies to the Stationers' Company, one for the king, and one for each of the two Universities.—17 Ch. II. c. 4.

¹ It took half a century after the Licensing Act expired before legal authors and judges outgrew the practice of soliciting and giving this license. Thus in case of *Viner's Abridgement*, published in 1746 (24 vols.) there are thirteen judges who formally sign a certificate allowing the printing and publishing.

In France the ideas of the legislature were similar. M. Sabot found in his statistical researches that from 1660 to 1756 no less than 869 authors, printers, and booksellers had been arrested and confined in the Bastille for publishing works against the king, government, religion, and morals.—*Rapport, Lib. de la Presse*, 1879.

² Carter, 89; 18 Ch. II. (1666). ³ 1 Mod. 258. ⁴ Kennett's Register, 176.

the Crown and the Star Chamber assumed jurisdiction over it by way of limiting the number of presses, and requiring a license to use them. And this mode of controul sufficed during the extraordinary activity developed by the Long Parliament and the contest between it and the Crown as to the first principles of government. The licensing act of Charles II. continued a like controul. But the epoch of the French Revolution and the contagion of the doctrines then prevalent in that country led to some minute details as to printers being again prescribed. In 1799 it was enacted, and is still law, that every person printing for hire shall keep for six months one copy of every paper printed by him, and shall write thereon the name and place of abode of the person who employed him so to print; and if he fail in either of these particulars, or fail within six months thereafter to produce to a justice of the peace a copy so marked when demanded, he incurs a penalty of £20.¹ Another obligation incumbent on printers was, and still is, that they shall print their own names and places of business either on the front or on the first or last leaf of all papers or books intended for circulation or publication, and of which they require to keep a copy. The penalty for omitting this is forfeiture of five pounds for every copy so printed.² And not only the printer, but the publisher and every person who shall assist in dispersing papers, not having the printer's name thereon, incurs this penalty. Though any volunteer informer was, until 1846, entitled to half the penalty for prosecuting this offence,³ now no prosecution is allowed unless it is in the name of the law officers.⁴ And the prosecution cannot be instituted after three months from the time when the penalty was incurred.⁵ The object of

¹ 39 Geo. III. c. 79, § 29; 32 & 33 Vic. c. 24. This obligation does not, indeed, apply to mere trade circulars, bank notes or securities, deeds, and transfers of stock, or to engravings.—39 Geo. III. c. 79, § 31; 51 Geo. III. c. 65, § 3. The Act 32 & 33 Vic. c. 24, specifies various mercantile documents on which the printer's name need not appear.

² 39 Geo. III. c. 79; 2 & 3 Vic. c. 12, § 2. The words "University Press" and "Pitt Press" are sufficient.—Ibid. § 3. ³ 39 Geo. III. c. 79, § 36. ⁴ 9 & 10 Vic. c. 33, § 1.

⁵ 39 Geo. III. c. 79, §§ 34, 35; 32 & 33 Vic. c. 24. In 1811 the printers petitioned the House of Commons to relieve them from the

this enactment¹ is to discover the printer of every publication, and through him the author. And such is the effect of the direction, and of the penalty for omitting to obey it, that a printer who has neglected it cannot recover the stipulated price, for no one can recover for work and labour done in direct violation of law.² But a piratical publisher cannot take advantage of the omission. Thus, where a publisher was infringing the author's copyright, by selling copies printed without the author's consent, it was held no defence for him when sued that the printer's name was not on the copies printed and sold, as required by the statute.³

Printers' contracts and custom of trade.—The contract of a printer to print a work is not classed under the head of contracts for the sale of goods, and hence does not, in order to be binding on the author or publisher, require to be in writing pursuant to the Statute of Frauds. It is merely a contract to do work and labour and supply materials, and can be proved by word of mouth.⁴ And hence, when a printer after printing part of a work stopped on discovering that it was libellous, and sued the author for work and labour so far as he had gone, he was held entitled to recover his charges.⁵ But when both printer and author engage in printing a work which is immoral, such as the adventures of a prostitute, neither can sue the other, as the whole foundation of their contract is bad.⁶ And, like other contractors, the printer has a lien on the printed

risk of putting their names to printed papers, for, by a moment's forgetfulness, they might forfeit 100,000*l.* At that period a man went about pretending that he wanted title-pages to an Elzevir edition of Cicero. It was a trap, and one printer, omitting to put his name to the page, incurred the above penalties. Another omitted to add "London" after Paternoster Row. The petitioners accordingly, warned by these risks, sought an amendment of the Act, 39 Geo. III. c. 79.—19 *Parl. Deb.* 181, 441. And the penalties were accordingly reduced to a small maximum by an Act of 51 Geo. III. c. 65 (repealed in 1868). And now, as the prosecution is allowed only by the law officers, this last requirement will usually protect printers against the penalties still in force, moderate as they are.

¹ 39 Geo. III. c. 79, § 29.

² *Bensley v Bignold*, 5 B. & Ald. 335; *Houston v Mills*, 1 M. & Rob. 325. ³ 2 & 3 V. c. 12, § 2; *Chappell v Davidson*, 18 C. B.

194. ⁴ *Clay v Yates*, 1 H. & N. 73. ⁵ *Ibid.* ⁶ *Poplett v Stockdale*, 2 C. & P. 198.

copies not delivered for the general balance of account in printing former parts of the same work, just as a tailor who makes a suit of clothes has a lien for the whole price on any part of such clothes.¹ And by the custom of the trade a printer cannot recover the price of printing a work before the whole is delivered.² And hence, when a fire broke out on his premises before the whole number of copies were printed, he was held not entitled to recover anything, though one third of the copies had actually been delivered.³ But there is no custom of the trade, by which a printer is bound, at his own expense, to insure for the benefit of the bookseller, the paper which he has on hand for the purpose of printing his books.⁴

Registration of printing presses.—The registration of printing presses was practically enforced from the time of Henry VIII. and Edward VI., for the earlier laws and ordinances all required the presses to be in a small number of hands, and these well known to the authorities. The Licensing Act of 1662, as has been seen, expressly required notice of the keeping of a press to be given to the Stationers' Company. After that Act expired the former requirement was soon again demanded. In 1712, Queen Anne having noticed in her message the increase of libels, the House of Commons resolved, that all printing presses should be registered, along with the names and places of abode of owners, and that the name and place of abode of all authors, printers, and publishers, should be set to each book.⁵ This design of registering printing presses and type makers seems however not to have been carried out

¹ *Blake v Nicholson*, 3 M. & S. 167. But a printer who has stereotype plates put into his hand for printing from them has no such lien, unless he can prove an express contract to that effect, or a custom of trade.—*Bleaden v Hancock*, 4 C. & P. 152; M. & M. 465.

² *Gillett v Mawman*, 1 Taunt. 137. ³ *Adlard v Booth*, 7 C. & P. 108.

⁴ *Mawman v Gillett*, 2 Taunt. 325. Any person who prints a copy of a proclamation, order, or regulation which falsely purports to have been printed by the Government printer, or under the authority of the legislature of a British colony or possession, or knowingly tenders in evidence such document, is guilty of forgery.—31 & 32 Vic. c. 37, §§ 4, 5 (five years' penal servitude or two years' imprisonment).

⁵ 6 Parl. Hist. 1125.

till 1799,¹ and the law was altogether repealed in 1869,² so that now registration is no longer required.

Early practice of a censorship of the press.—Besides the device of restricting the number of printers, which the mere growth of business soon rendered impracticable, all Governments at first thought it absolutely necessary to appoint a censor, in order to watch over the beginning of all writings and permit such only to be published as he should think proper. This notion was founded on the simple faith that books were like gunpowder or poison, which if once made, the mischief might be irreparable. And in working this principle out, as the clergy were more distinguished for learning than any other class, this appointed function of censorship seemed naturally to be devolved chiefly upon them. Even Plato thought that a censorship was the only way of preventing lewdness in authors.³ The early Christians soon thought it was also a matter on which they should lay down rules. By the Council of Carthage in 400, bishops were prohibited from reading the books of the Gentiles, though the primitive councils up to that time had left the reading of such books to the conscience of each. The dread of heresy grew more and more urgent. The Popes after 800 began to be more and more intolerant, and Martin Vibart, 1420, was said to be the first who excommunicated those who read prohibited books.⁴ A bull of Leo X., in 1515, required bishops and inquisitors to examine all books before printing, and to suppress heretical opinions.

In England the same views prevailed. A statute of Henry VIII. prohibited women and artificers from reading the New Testament in English, though noblewomen were excepted; and the Lord Chancellor and the King's Justices were also excepted, for it was then deemed not improbable they might not only read but expound a chapter with proper safeguards.⁵ In Queen Elizabeth's injunctions about the clergy in 1559, she recited the abuse of printer's books, and commanded that no person shall print any paper except first licensed by her Majesty or six of her Privy Council or the archbishops, bishops, and the archdeacon, and the name

¹ 39 Geo. III. c. 79. ² 32 & 33 Vic. c. 24. ³ Plat. de Leg. b. vii. ⁴ Blount's Vindic. Lib. Press, 5; Bayle's Dict. Macchiavelli says it was Leo X. ⁵ 34 & 35 Hen VIII. c. 1.

of the licenser was to be added, and no pamphlets, ballads, or plays, were to be printed without the license of three Commissioners appointed to execute statutes for uniformity in London. But profane authors and school books were excepted.¹ The decree of the Star Chamber in 1637, as already stated, also ordered all books to be licensed by the Archbishop of Canterbury or the Bishop of London, or their substitutes. The Long Parliament, imbued with the same notions and fears, passed several acts for the regulation of printing, whereby they enforced a previous license of books and the printing of the printer's name, as well as a license for printing presses, and also gave power to seize those that were unlicensed, and also power to enter houses and apprehend the authors or sellers.² In 1662 the Licensing Act,³ as elsewhere stated, prohibited the printing of a book until it was first licensed and registered at Stationers' Hall; also until the consent of the author was obtained. That Act was continued several times, and during William and Mary, till it came to an end in 1692.⁴ The immediate cause of the abolition of the office of censor was the striking incapacity of one of its holders, if indeed the greatest of intellects could, in any age or time, be equal to the task of drawing the line in so delicate a business.⁵

¹ 1 Somers' Tracts, 72. ² Scobell's Acts, 1643, 1647, 1649; H. L. Journ. 16 Sep. 1647. ³ 13 Ch. II. c. 33, *ante*, p. 45.

⁴ 1 Jas. II. c. 7; 4 W. & M. c. 24. It was strange that in the Declaration of Rights no one thought of expressly repealing the statute which then subjected the press to a censorship; and this showed, as a great authority has remarked, "how little it was as yet understood that the liberty of discussion is the chief safeguard of all other liberties."—1 *Macaulay, Hist.* c. 10.

⁵ The censor of the press in 1692 had, in his zeal for divine right, refused his sanction to a History of the Bloody Assizes. Blount attacked the principle of a censorship. One Bohun had, while censor, licensed unawares a book which the House of Commons resolved ought to be burnt by the common hangman, and he was ordered to be dismissed and committed to prison. This event opened the eyes of men to the worthlessness of the function of a censor, and the booksellers and printers joined in the complaints. The Act was not renewed after 1692. Newspapers were commenced almost immediately thereafter, and increased rapidly.—*Macaulay, Hist.* c. 19.

In France Lewis XV., in 1724, by a decree, made it compulsory for all printers to get a license from the parish priest, that they were sound in the faith.—*Rapport, Lib. de la Presse*, 1879.

The vocation of the censor, after existing more or less since the introduction of printing and for more than two centuries, has thus been abolished for 188 years, for all writings; and the only vestige of anything akin to it which is left outstanding is found in the practice of licensing plays, which is noticed in another place.¹ The extraordinary powers vested in the Attorney-General of filing criminal informations have sometimes been represented as the nearest approach to a censorship, though this last remedy merely follows swiftly instead of preceding the development of the danger.²

Early doctrines as to publication of news.—While a censorship was more or less shadowed forth by the common law, or at least was early taken up by the statute law, as inevitable for all publications, and that office was legalised by means of the Licensing Act, yet when that Act expired the fetters fell off for ever, without the prospect of renewal. It was not to be wondered, that newspapers should have met with a like experience. Though at first unknown and long obscure, these have gradually developed into the most powerful of all the forms of publication, and the most transcendent of all the means of free thought, and so have attracted the vigilant care of the legislature and the law. The judges at first rigorously applied to them the maxim, either derived from common law or involved in statute law, that to publish news of any kind, especially such as related to Government and to the public generally, required a license of some kind from the Sovereign. Britton seems to treat it as in his time an indictable offence to invent and report rumours and falsehoods concerning the king.³ Coke thought that it was the common law, founded on the law of God, that the author of false news was punishable.⁴ The common law, indeed, according to the dicta of early judges seems to have treated circulation of news as the same as the circulation of lies, and which it could scarcely be an honest employment to collect and publish. But subsequent experience has reversed these crude notions, and shown, that much of the interest of mankind is attracted by the reading of narratives of contemporary circumstances and events which may or may not be true, and the truth

¹ See *post*, chap. xi.

² See *post*, chap. v.

³ Britton. b. i. c. 21.

⁴ 2 Inst. 228.

of which is either taken for granted, or their verification willingly postponed till the accidents of the future confirm or falsify them. The business of collecting news, whether true, or merely probable and as near the truth as is attainable for the moment, is thus viewed as a creditable employment, and is at least entitled to the equal protection of the law. And when the collection of news is accompanied with the comments of intelligent editors, this form of publication has assumed the most commanding influence over mankind, and is now almost part of daily life and education, and insensibly moulds the minds of all citizens.

Oldest statute law as to false news.—The old law on the subject of false news is founded on the statute of West. I. in 1275, which commanded, that “none be so hardy as to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm, and he that doth so shall be taken to prison till he has brought into court him who did speak the same.”¹ And Coke gives as instances of the mischief caused by false bruits and rumours the battles of Lewes and Evesham; and says the statute reduced the punishment to the milder form of imprisonment, which formerly was cutting out the tongue, unless the whole head could be redeemed. The next statute, of 1378, as to *Scandalum magnatum*, narrating the horrible and false lies of great men (specifying most of the high functionaries and peers), again forbids “any one to be so hardy as to devise, speak, or tell any false news, lies, or other false things of such great men,” and repeated the same punishment.² The next statute, of 1388, went a little

¹ Stat. West. I., 3 Ed. I. c. 34; 2 Inst. 225; *R. v Derby*, Fortescue, 140.

² 2 Rich. II. st. 1, c. 5. The first statute was said to be suggested by the Duke of Lancaster, who was unpopular with the villeins of his time, and yet it was said no action had been brought on that statute for 100 years.—3 *Reeves' Hist.* 211; 1 *Parl. Hist.* 160; 1 *Mod.* 233; 2 *Mod.* 154-6. Wickham had slandered John of Gaunt with illegitimacy.—4 *Inst.* 51. A man was put in the pillory with a whetstone round his neck by the aldermen of London for circulating false reports about a murder having taken place in the city, and reflecting on the insufficiency of the watchmen.—*Riley, Mem. Lond.* 454 (A.D. 1381). And in 1382 another who went about in the city saying, “The Lord Mayor had been committed to the Tower of London, there to be imprisoned in the Blackhole,” was treated in the

further, and enacted, that if the author of the lies and false news cannot be found, then he who repeats them shall be punished by the advice of the council, notwithstanding the statutes.¹ Statutes of a like kind followed in the reign of Edward VI. and Elizabeth.² There seemed to be soon after the Reformation an abuse of prophesying, for a statute of 1549 punished with imprisonment and fine whoever set forth in speaking, singing, writing, printing, or publishing any fantastical or false prophecy on the occasion of any arms, fields, letters, &c., with intent to raise insurrection or disturbance. And Coke says lamentable and fatal events had fallen out upon vain prophecies carried out of the inventions of wicked men; and that predictions either of the time or end of the world were not lawful, and are contrary to Scripture.³

Right to publish news generally.—These statutes show how feeble and imperfect was the wisdom of Parliament as regards what is now the leading work of free thought and speech. The only aspect of the business was at first, the effect of news on great men and the probability of their being libelled. The public rights were as yet undreamt of. The statutes however did not go the length of punishing or restraining the mere publication or circulation of news in the modern acceptation of the term, far less of treating it as a constructive breach of the peace. All that they did was to declare that if false news relating to great men were published, then some punishment of a vague kind would

same way.—*Ibid.* 460. A statute of Henry VIII. also made it felony to declare any false prophecy on the occasion of arms, fields, or letters.—33 Hen. VIII. c. 14. A Chancellor of Edward VI. issued a proclamation enjoining all justices to arrest all tellers of vain and forged lies, and commit them to the galleys to remain during pleasure.—2 *Campb. Ch.* 39. And a statute of 1554 gave justices of the peace power to inquire into this offence, and put those early statutes in force.—1 & 2 Ph. & M. c. 3. This statute of 1554 was the first to punish specially the devising or spreading of false news and tales against the king and queen. The first offence was punished with pillory and loss of one ear. And those who printed and set forth ballads or writings to stir up insurrection were punished with the loss of the right hand, and on subsequent offences with imprisonment for life and loss of goods.—1 & 2 Ph. & M. c. 3; 1 Eliz. c. 6.

¹ 12 Rich. II. c. 11.

² 3 & 4 Ed. VI. c. 15; 5 Eliz. c. 15.

³ 3 Inst. 1.8.

result. But there was no enactment, express or implied, which subjected the mere publication of general news to any punishment or to the necessity of a preliminary license except so far as was common to all other publications. Yet the judges adopted decided views to the contrary, and these assumed the form of a first principle, namely, that newspapers were, *per se*, unlawful, and were constructive breaches of the peace, and savoured of sedition. When the Licensing Act was about to expire in the time of Charles II., the twelve judges were assembled to discover, whether the press might not be as effectually restrained by the common law; they no doubt thought all mischiefs had or ought to have a remedy, and they had a notion, that the publication of any news whatever without the king's authority was dangerous. They came to the resolution, that it was criminal not only to write seditious papers and false news, but likewise to publish any news without a license from the king, though such news were true and innocent.¹

This doctrine, alleged to be laid down by the judges of

¹ *R. v Harris*, 7 St. Tr. 929; *Entinck v Carrington*, 19 St. Tr. 1070. SCROGGS, C. J. laid down the law to this effect, that "all the judges met at the king's command, and held that all persons that do write, or print, or sell any pamphlet that is either scandalous to public or private persons, such books may be seized and the person punished by law. And all writers of news, though not scandalous, seditious, nor reflective upon the Government or the State, yet if they are writers (as there are few others) of false news, they are indictable and punishable upon that account." The jury found one Harris "guilty of selling a book," but SCROGGS, C. J., told them that was not their business; they were only to say guilty or not guilty. And Harris was fined 500*l.*, put in the pillory an hour, and ordered to find sureties for good behaviour for three years.—*R. v Harris*, 7 St. Tr. 930. JEFFREYS, C. J., also told juries that "it was the opinion of all the judges of England that it is the law of the land that no person should offer or expose to public knowledge anything that concerns the Government without the king's immediate license."—*R. v Carr*, 7 St. Tr. 1115.

SCROGGS, C. J., repeated his doctrine on another occasion, thus:—"When by the king's command we were to give in our opinion, what was to be done in point of the regulation of the press, we did all subscribe, that to print or publish any newsbooks or pamphlets of news whatsoever is illegal; that it is a manifest intent to the breach of the peace, and that they may be proceeded against by law for an illegal thing. Though the thing is not scandalous, yet it is illicit and without authority, and the author ought to be corrected for it."—*R. v Carr*, 7 St. Tr. 1127.

Charles II., that the publication of news was *per se* illegal, unless licensed by the Crown, whencesoever derived, had some encouragement from the earlier statutes; nevertheless, there was nothing in the common law to warrant it, for at no epoch of history could it ever be reasonably assumed, that the business of collecting and dispersing news required the license of the Crown or of Parliament, or of any functionary, any more than the liberty to think and speak, or to use any of the faculties with which mankind are endowed. The doctrine, after haunting the courts, and even apparently lingering in the mind of Holt, vanished out of sight without the necessity of being either solemnly repealed or reversed or repudiated, unless we suppose that it died with the Licensing Act in 1692. This last collection of false views of all kinds relating to the freedom of thought happily was itself dispersed by the Revolution of 1688 and its immediate consequences.

Maliciously publishing what is known to be false.—But while no liability is now incurred by publishing news in the ordinary sense, except they are libellous, there is now a distinct offence declared in modern times as to some of these, namely, when they are known to be false. While malice is usually matter of inference from the conduct and subject matter, this criminal offence is expressly declared by statute, whenever one maliciously publishes a defamatory libel knowing it to be false.¹

Special laws as to newspapers.—Though the doctrine as to a license of the Crown being necessary in order to publish a newspaper was never thoroughly settled, and soon was abandoned, there were other exceptional laws from time to time passed with respect to these periodicals. The whole doctrine of the common law must have originated in the sixteenth century, for previously even the mechanical means of circulating news had scarcely come into existence.² One of the first definite restrictions put

¹ 6 & 7 Vic. c. 96, § 4. Imprisonment for two years and a fine at discretion. As to the usual defence, see *post*, chaps. ix. and x.

² The first gazette is said to have been published at Venice in 1536, but it was not allowed to be printed, being only circulated in manuscript.—*Chalmer's Ruddiman*, 105; 2 *Lodge, Ill. Brit. Hist.* 414. The first French newspaper was the *French Mercury* in 1611, founded by Jean Richer and Étienne.—*Rapport, Lib. de la Presse*,

upon newspapers was the Stamp Act of 10 Anne, c. 19, in 1711, which, to the dismay of authors, for the first time imposed a duty.¹ The duty was increased in 1820, and so continued till 1855, when it was abolished.² The epoch of the French Revolution caused further restrictions. In 1798 before any person could publish a newspaper he was bound to deliver an affidavit at the Stamp Office, setting forth the true proprietors, or at least two proprietors besides the printers, and their places of abode. But that statute was repealed by another Act of 1836, or rather it was then re-enacted with alterations; and this last Act in turn was repealed in 1870, and now nothing remains of any such requirement.³ Another requirement of 1819 was, that a recognizance of 300*l.* with sureties should be entered into by publishers of newspapers. The object of this recognizance was to provide a fund for securing payment of fines that might be imposed on convictions for libel.⁴ And in 1830 the amount was raised to 400*l.* in order to provide for the damages that might be found by juries in actions for libel.⁵ These enactments were, however, also altogether repealed in 1869.⁶

Freedom to publish newspapers, and how far they are capable of suppression.—All the restrictions on the publishing of newspapers caused by stamp duties, advertisement duties, and affidavits, and recognizances being thus swept away, the occupation of newspaper proprietor, with his mode of investing capital, is as free as other occupations, and there are few peculiarities left except by way of facilitating the discovery of proprietorship when that

1879. The first in America, *The Boston Newsletter*, in 1704. The first in Germany in 1715. It was said, that in the year of the Armada, when the excitement of the people was intense, Queen Elizabeth caused to be printed the first Gazette that ever appeared in England.—*Sir J. Macintosh, R. v Peltier*, 28 *St. Tr.* 529. But this has been said to be a forgery. It is said that the influence of newspapers on politics began to be felt noticeably in 1738.—*Danvers, M.P.*, 10 *Parl. Hist.* 448.

¹ Addison, *Spect.* No. 445. An advertisement duty was also imposed in 1711, and repealed in 1853. The paper duty which was common to all publications was repealed in 1861.—137 *Hans. Deb.* (3) 1110.

² 18 & 19 *Vic.* c. 27. ³ 38 *Geo. III.* c. 78; 6 & 7 *Will.* IV. c. 76; 33 & 34 *Vic.* c. 99. ⁴ 60 *Geo. III.* c. 9. ⁵ 11 *Geo. IV.* & 1 *Will.* IV. c. 73. ⁶ 32 & 33 *Vic.* c. 24.

is needful. There is no court or functionary which has any power whatever to suppress, with or without reason, any newspaper, the publishers of which are liable for libels to the same extent as the publishers of other books, but not to a greater extent; and the punishment does not directly affect the continuance of the periodical. Newspapers may entail punishment on their proprietors and publishers on each occasion of offence, but cannot on any pretext be suppressed.¹

In continuance of the legislation of 1798, in order to facilitate the remedy against proprietors of newspapers for libellous matter, any person, in order to bring or carry on an action on that ground, may proceed for a discovery of the name of any one concerned as printer, publisher, or proprietor, or of any matters relative to the printing and publishing; and the defendant is bound to make the discovery required before he can make any defence.² But this discovery is not to be used in any proceeding except in that particular action. And the discovery may be enforced against the publisher, in order to ascertain the name of a proprietor, whom the plaintiff wishes to sue in preference to the other.³

Postage facilities for newspapers.—Facilities for circulating newspapers through the post-office are allowed on registration by the proprietor or publisher at the General Post-Office, according to a form there required.⁴ For the purpose of this Act a newspaper is defined to be a publication consisting wholly or in great part of political or other news, or of articles relating thereto, or to other current topics, published weekly or oftener, and printed on sheets unstitched, and bearing the full title and date

¹ In one case the Queen's Bench made a rule absolute, forbidding the publication, in future, of a certain newspaper by any person whomsoever; but that precedent, which belongs to the time of Scroggs, C. J., seemed never to be followed, and that judge was afterwards impeached, partly on this account.—*R. v Carr*, 7 *St. Tr.* 1111; 8 *St. Tr.* 198. It seems quite enough to punish by imprisonment or fine newspaper publishers when they offend; but to suppress the newspaper is an interference with the liberty of trade, and is in no way essential to protect any court or Government, and it never even punishes the real offender. And the immortal secret of Junius shows how difficult it is even to trace the real author.

² 6 & 7 Will. IV. c. 76, § 19. ³ *Dixon v Enoch*, L. R. 13 Eq. 400. ⁴ 33 & 34 Vic. c. 79.

of publication.¹ And to prevent circulation of indecent and obscene prints, books, engravings, or post-cards, power is given to the Postmaster General, with consent of the Treasury, to make regulations to prevent such papers being sent by post.²

Advertisements to recover stolen property.—One peculiarity remains as to the contents of a newspaper. Whoever publicly advertises a reward for the return of stolen or lost property, and uses words purporting that no questions will be asked or no inquiry made after the person producing such property, and whoever prints or publishes such advertisement, shall forfeit 50*l.* to whoever sues for the same.³ Yet the action for these penalties cannot be brought without the written assent of the Attorney or Solicitor General being first obtained. And the action must be commenced within six months after the forfeiture is incurred.⁴

Security of Post-Office letters.—The right of free speech and writing can scarcely exist in perfection without mechanical facilities for exchanging letters between correspondents; but whether this function is best performed by private enterprise or by the State can be of little importance except so far as safety, regularity, and economy are concerned. What is desired by each and every citizen is, that he shall be entitled to send and receive all communications which he thinks material to his own interest, and that no third party shall be allowed to tamper or interfere with this operation—so that a message sent in writing shall be secret and inviolable from the moment it is despatched till the moment it is delivered. This has for two centuries been more or less attained. The great medium for this communication between the subjects began in 1635, on a small scale, at the suggestion of the Crown, but Parliament soon saw its importance, and in 1649 passed a resolution, that the office of postmaster ought to be in the sole disposal of Parliament. In 1710 a statute laid down the chief rules, and one of these, continuing as it did the first sketch of plan projected under Charles I.,

¹ 33 & 34 Vic. c. 79, § 6. A supplement of a newspaper is also defined.—*Ibid.* In case of dispute the Postmaster-General, subject to an appeal to the Treasury, shall conclusively decide what is a newspaper.—*Ibid.* § 14.

² 33 & 34 Vic. c. 79, § 20.

³ 24 & 25 Vic. c. 96, § 102.

⁴ 33 & 34 Vic. c. 65, § 3.

forbade all other persons to carry and deliver letters for hire.¹ The machinery by which this great institution has been maintained involves the same details as all other businesses, and its main importance is now as regards the security of private communications. Severe punishments attend all the servants of the Post-Office for stealing or tampering with letters. Even to delay or detain wilfully a post letter is in them a misdemeanour.² And every other person to whom a post letter has been delivered even by mistake, and who wilfully secretes or detains it, also commits a misdemeanour.³

Post letters may be opened by Secretary of State.—

But though the servants of the Post-Office and third parties are punishable for opening or tampering with letters while in the custody of the Post-Office, an exception has always been maintained. This exception is, that any letter may be opened, detained, or delayed in obedience to an express warrant in writing under the hand of a Secretary of State.⁴ From the first the Government had exercised its discretion in this matter, and retained in its hands the power of opening any private letter at any time. And it appears to have been a century ago the common complaint of leading statesmen, that their political opponents made a practice of opening their letters when they had the power.⁵ And however arbitrary this may seem, still on full investigation it has been deemed safer to leave an uncontrolled discretion, as in many other instances is done, confided to a functionary not likely to abuse it, rather than abandon what on some great emergency may prove a slight assistance in thwarting seditious or illegal machinations.⁶

¹ 9 Anne, c. 10, § 17.

² 7 Will. IV. & 1 Vic. c. 36, § 25.

³ 1 Vic. c. 36, § 31.

⁴ *Ibid.* § 25.

⁵ 3 May's Const. Hist. 45.

⁶ In 1822 complaint was made by a member of Parliament, that a letter sent to him by a prisoner had been opened. And though the Government claimed the right to do so for precaution, yet many urged that it should be deemed a breach of privilege; this step however was not taken.—6 *Parl. Deb.* (2d) 282, 646. Again, in 1844, instances of private letters being opened were complained of, and Parliamentary committees investigated the practice, and found sufficient confirmation of the suspicion, that such a practice was not unfrequent, especially in connexion with foreign refugees.—75 *Parl. Deb.* (3) 1264; 76 *Ibid.* 212, 296. SIR R. PEELE said, that no rule could be laid down on such a subject, and successive Secretaries of State of all parties had been in the habit of exercising this power at discretion.—*Rep. of Secret Com.* 1845.

CHAPTER IV.

RESTRICTIONS ON THE PRESS AND SPEECH AS REGARDS
BLASPHEMY AND IMMORALITY.

Blasphemous words and publications.—One of the restrictions on the freedom of speech and writing is, as already stated, that the writing shall not be blasphemous, or rather those who speak and write must take care not to transgress the limit which the law calls by that name. Some confusion of thought has been displayed in assigning the precise ground on which the law enforces this restriction, which perhaps is not to be wondered at, seeing that in every country and age there have been laws of some kind, and these more or less severe, against the offence which now corresponds to blasphemy.¹ In its earlier stages, since the Christian era, it was always difficult to distinguish it from heresy and schism, though now the two last are mere ecclesiastical offences peculiar to the clergy, while blasphemy has long been taken out of the charge of the Church and cared for by the general law. At first the common law courts professed that it was not competent for them to entertain an indictment or information for blasphemy. And in a case in 1617, when a man was

¹ The ancient Jews treated blasphemy as a capital offence, the punishment for which was stoning.—*Lev. xxiv. 16*; *v. 15*; *Exod. xxii. 28*; *Acts, vi. 14*. And the Greeks and Romans were equally severe in their views, but as these more strictly belong to the subject of heresy and so part of the law relating to the Church, or what corresponded to the standard Church of the time being, that division of the law will more properly be resorted to for the treatment of this subject.—See *post*. The Romans thought it impious to undertake a battle in opposition to the sacred birds.—*Suet. Nero, c. 2*.

charged with saying that "preaching was but prating, and hearing of service was more edifying than two hours preaching," the whole court held that it was a question only for the High Commissioners.¹ By blasphemy is now meant not the repudiation of any particular definite creed such as heresy implies, but a public and scurrilous denunciation of all creeds and beliefs which are founded on the existence of a God as revealed in the Holy Scriptures.² And the expression "the existence of a God" was in the statute of William III. treated by the legislature as including the existence of the Trinity, according to the standard belief of the leading Churches of all countries where the Bible is the accepted basis of our knowledge. Blasphemy is not now an offence subject to the remedy provided by the Church Discipline Act or by any Ecclesiastical Court, being punishable by common and statutory law.³ For though, when the practice of burning heretics was abolished in 1678, the other ecclesiastical punishments of blasphemy by excommunication, deprivation, degradation, and other ecclesiastical censures were excepted,⁴ yet no crime of that name can now be committed which is not as applicable to ecclesiastics as to laymen.⁵

Apostasy as a crime.—There is one species of blasphemy which, though once prominent, is scarcely now distinguishable or recognised. The civil law treated any departure from the settled faith of the Christian Church, especially if he once professed it, as worse than heresy, and a cause of forfeiture of property, unless the apostate had children and kindred. He was declared infamous and incapable of succession or making a testament, and suffered other disabilities.⁶ Under the laws against the Manichæans such offenders were banished.⁷ And if they seduced or perverted others they were punished with death.⁸ And Bracton treated this as also part of our law.⁹ And though no

¹ R. v Attwood, Cro. Jas. 421.

² A statute of Jas. I. c. 21, punished with a fine all players who "jestingly or profanely spoke" of the persons of the Trinity.

³ 3 & 4 Vic. c. 86.

⁴ 29 Ch. II. c. 9.

⁵ 9 & 10 Will. III. c. 35. This Act impliedly repealed all jurisdiction of the Ecclesiastical Courts for that offence.

⁶ Code, 1. 7. 1, 4. ⁷ Ibid. 1, 7, 6. ⁸ Ibid. 1, 7, 5. ⁹ Bract. b. iii. c. 9.

law or statute now punishes any change of faith, yet this ancient view of apostasy is obviously the main foundation of our only existing statute against blasphemy, passed in the time of William III.

Early statutes against blasphemy.—In the earlier centuries there was no doubt great difficulty in defining what things were deemed blasphemous, though the punishment might be uniform and unfailing. By a statute of 1539 any person who by word or writing should publish or hold opinions contrary to five specified articles of religion was to be punished, for a first offence with loss of land and goods for life, and with imprisonment for life; and on a second offence be adjudged a felon and capitally executed.¹ And of those five articles made of such vital moment, one was, that “the bread used in the communion is changed into the body of Christ,” and another was, that “it is unlawful for priests to marry.” Later statutes protected other tenets of the established religion of the time.² Sometimes the House of Commons went out of its way to advance the remedy against the same offence, as in 1697, when it resolved, that a tract against the Trinity was a blasphemous libel, and ordered it to be burned by the hangman. At that time, indeed, one Firmin, a rich citizen, having circulated Unitarian pamphlets, which alarmed the clergy, the House of Commons presented an address to the Crown,

¹ 31 Hen. VIII. c. 14.

² By a statute of 1542 if any one who taught, preached, or maintained any matter contrary to his Majesty's godly instructions and the articles of faith set forth in 1540, was a priest, and refused to abjure, he was, on a third offence, to be burned as a heretic; and if a layman he was, on a third offence, to be perpetually imprisoned, and to forfeit his goods.—34 & 35 Hen. VIII. c. 1.

By a statute of 1547, repealed by Mary and revived by Elizabeth, whoever by words depraved, despised, or reviled, the blessed sacrament was liable to imprisonment and fine.—1 Ed. VI. c. 1; 1 Eliz. c. 1. But that statute directed the offence to be tried by the bishop or his chancellor, and the modern Church Discipline Act has impliedly repealed any such mode of trial for the offence.—3 & 4 Vic. c. 86

The Long Parliament also passed severe acts against blasphemous and atheistical books, as well as against profane swearing; making a second offence punishable by banishment.—A.D. 1650, *Scobell's Acts*. The statutes against profane swearing are treated under the head of “Public Worship” *post*.

suggesting the suppression of these detestable crimes.¹ And the Act of 9 William III. c. 35, was thereupon passed, which was said to be an imitation of the edict of the Emperor Marcian in the sixth century against the Eutychians and the Apollonarists, whereby they were declared incapable of inheriting or of making a will; but it allowed retractation and recantation within four months.²

The existing statute against blasphemy.—This statute of 9 William III. c. 35, in 1697, which is still in force, enacted, that if any person educated in or having made profession of the Christian religion deny any one of the Persons in the Holy Trinity to be God, or assert or maintain that there are more Gods than one, or deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he is on indictment or information, for the first offence liable to be declared incapable to hold any office or employment, civil or military, and if he hold such office it shall be void. On a second offence he will be subject to three years' imprisonment. Whoever is convicted of a first offence will, however, escape penalties and disabilities by renouncing his error in open court. And information of the offence, for words spoken, must be given within four days after the offence was committed, and the prosecution for such words must be within three months after such information.³ This statute, so far as it included the denial of the Trinity, was repealed at the suggestion of the Unitarians in 1813.⁴ In other respects it remains in full force. But as it in express terms applies only to those who had made profession of the Christian religion, and this language is now not capable of any precise meaning, since the Test and Corporation Acts are repealed, it is practically inoperative except against the clergy. The statute was obviously framed on the old models, and had little regard to modern modes of thought. The words "assert and maintain" point to times when courts assumed too easily, that they could dictate to every man, not only what he should say, but what he should think. Notwithstanding that statute, the law is clear, that honest argument and belief, if reasonably maintained and temperately expressed without offence to any third person, cannot be punished, whatever result such argument leads

¹ Toulmin's Diss. 123.

² Furneaux's Lett. 28.

³ 9 & 10

Will. III. c. 35.

⁴ 53 Geo. III. c. 160, § 2.

to. The jury of the day, moreover, having the greatest interest in protecting the liberty of thought, for it is their own liberty which is in question, must always in the end be those who apply and enforce, and so confine within proper limits a law so widely and comprehensively written and capable of being used oppressively against honest doubters. The statute therefore may now be treated as doing little more than cautioning men to adopt a temperate mode of expressing religious opinion, and to give due attention to the rights of others who hold and maintain with equal honesty the opposing opinion. It may usefully punish those of the clergy, if such there be, who assert, without thinking or reasoning, rather to irritate their neighbours than quiet their own consciences; but it cannot otherwise fetter free thought in whatever form that thought may be published. Moreover the kind of punishment and the shortness of time allowed to the remedy alike tend to make such a statute all but inoperative in that case, where the words have merely been spoken and not published.¹

Statute does not repeal common law against blasphemy.—The statute of William III. and its amending Act, 53 George III., c. 160, it is true, do not extinguish or supersede the common law doctrine as to blasphemy and immorality; at most it furnished merely a collateral and alternative remedy.² But the common law could never be pushed to the extreme length which the language of the

¹ The statute has also been said to operate only against those who are in possession of offices or in expectation of them, the object being supposed to be to prevent infidels getting into places of trust.—Per *Best, J.*, *R. v Carlile*, 5 B. & Ald. 166.

“Every man has a right to investigate with decency controversial points of the Christian religion; but no man, consistently with a law which only exists under its sanctions, has a right to deny its very existence, and to pour forth such shocking and insulting invectives as the lowest establishments in the gradations of civil authority ought not to be subjected to, and which soon would be borne down by insolence and disobedience if they were.”—*Erskine, Speech re “Age of Reason.”*

In 1831 Lord Althorp, D. O’Connell, and Sir R. Peel all agreed, that it was contrary to the spirit of our law that there should be any prosecution against a man for any religious opinion except where gross ridicule or insult are resorted to, or where the young are affected.—8 *Parl. Deb.* (3) 6.

² *R. v Woolston*, 2 Str. 834; *Fitzg.* 66; *Barnard.* 162; *R. v Carlile*, 5 B. & Ald. 161.

legislature taken by itself describes as its limit. And in all the cases the prosecutions have been those, where the defendant adopted mere abuse and scurrility, and never resorted to anything resembling argument or reasoning.¹ The trial of Hone was a singular example of the power of juries and the adjustment of the common law to circumstances. Hone was tried three times in succession for blasphemous libels, being parodies on the Catechism, Lord's Prayer, Ten Commandments, and the Athanasian Creed. The judges told the jury, in plain terms, that they were blasphemous libels. But the defendant, without any assistance of counsel, persuaded the jury, that the object was not profane, but political, namely, to destroy the flagrant abuse of sinecures and other like corrupt practices; and moreover he contended, that even if the parodies were somewhat profane, yet many illustrious and pious persons before him had thought fit to use parodies also quite as bad. And each of the three juries in succession, after a few minutes' retirement, gave a verdict of not guilty.²

¹ In one case the defendant published, that the Bible was a history of the grossest vices and a collection of the most contemptible and paltry tales, and he was found guilty and sentenced to a year's imprisonment.—*R. v Williams*, 26 *St. Tr.* 719. So it was in another case, where the defendant alleged, that the Scriptures were mere fables from beginning to end, and the authors of them were liars and deceivers.—*R. v Eaton*, 31 *St. Tr.* 927. It was held to be a blasphemous libel to publish a work which represented Jesus Christ as an impostor, or a murderer in principle, and a fanatic.—*R. v Waddington*, 1 *B. & C.* 26. And so it was, to say that Jesus Christ was a bastard and Christianity was a cheat.—*R. v Taylor*, *Ventr.* 293. So a buffooning discourse about the Trinity was treated as indictable.—*R. v Hall*, 1 *Str.* 416. And the turning of the miracles of our Saviour into contempt and ridicule.—*R. v Woolston*, 2 *Str.* 834; *Fitzg.* 64; *Barnard.* 162. And the ridiculing and denouncing Moses and the Pentateuch as impositions.—*R. v Annett*, 1 *W. Bl.* 395.

² Hone's Trials, A.D. 1818. A publisher of Shelley's poems was indicted, in 1841, for publishing *Queen Mab* as a profane and malicious libel concerning the Christian religion; and the judge left it to the jury with a suggestion, that at least one passage was insulting to Christian minds. It was, however, part of a complete collection of poems that had been long before published, and poems are by the common understanding of mankind unlikely to influence conduct in the same manner as some other writings. The jury found the publisher guilty, but succeeding juries would probably entirely differ in the general effect of such publication, the time and occasion and object suggesting a totally different motive from

One of the results of a writing or speech being blasphemous is, that no action can be brought by either party to enforce any contract involving the committing of such an offence. And hence, where a lecturer hires a room to deliver lectures which seem to have for their object the dissemination of blasphemous doctrines, either party may break the contract with impunity, and the court will not be nice in deciding, whether the basis was blasphemy at common law or by statute, or something very near to the offence.¹

Remedy against blasphemies.—The mode of proceeding at common law against a person for blasphemy was by indictment or criminal information. The defence usually set up is, that the words are only the results of independent thought, and that the expression of them is the affair of the individual, and does not concern the public. But whether the case is one of temperate reasoning or offensive and scurrilous abuse, intended merely to insult the orthodox, is necessarily the main question for a jury. There can be no justification, in the ordinary sense, as in the case of a defamatory libel, that it was for the public good that the libel should be published, for in no circumstances can it be for the public benefit, if it be once established that it is seditious or blasphemous.² And yet any considerations arising out of the public good, if these are fairly pertinent, can generally be brought to bear on the main point, whether the defendant, in his honest endeavours, was or was not prosecuting the public good at the time even if he were

that held to be proved.—*R. v Moxon*, 2 *Mod. St. Tr.* 362; *Parl. Deb. H. L.* 13 July, 1857. And the judge appositely remarked on the same trial, that such publications would be more effectually suppressed by confuting the sentiments than by prosecuting the authors or publishers.—2 *L. Denman's Life*, 129. Moxon was convicted, but never called up for judgment.

The law relating to blasphemy at common law is based partly on the maxim once prevalent, that Christianity was part of the law of England, as to which see 1 *Pat. Com. (Pers.)* 111. It must be recollected on this subject, that it was the doctrine of Coke, and even so late as Holt, C. J., and Treby, that any law, that is, any statute made against any point of the Christian religion, or what they thought was the Christian religion, was void.—10 *St. Tr.* 375. This showed a very imperfect notion of the scope of municipal law, and of the action and power of Parliament.

¹ *Cowan v Milburn*, L. R. 2 Exch. 230.
C. C. 45.

² *R. v Duffy*, 2 Cox,

somewhat mistaken in his mode of doing so. Whenever verdict or judgment has been given to the effect, that a publication is blasphemous or seditious, the judge may forthwith order all copies in the defendant's possession, or any other person's possession for his use, to be seized, and if there is no appeal then to be destroyed.¹ And any justice of the peace may grant a warrant to search for the same.

Punishment of blasphemy.—The old modes of punishing blasphemy have, as in other cases, been always cruel and excessive. Plato thought blasphemies should be punished with imprisonment for life or a shorter period; and also with denial of burial.² The Wisigoths ordered a blasphemer's head to be shaved and his body punished with 100 stripes and perpetual imprisonment.³ In countries adopting the civil law, Menochius said the punishment so late as the seventeenth century was boring the tongue or cutting it out, and sometimes it was death.⁴ The Franks punished the offence with death, and at later dates with imprisonment and public penance.⁵ In England so late as 1656 Parliament ordered Naylor the Quaker, who personated the Saviour and was obviously a lunatic, to be punished by having his tongue bored with a red-hot iron, by being burned in the forehead with the letter "R," and whipped and pilloried.⁶ One mode of punishment, which nearly all barbarous nations have thought to be most appropriate for blasphemy, was exposure in the pillory, and this mode was adopted in most of the earlier cases in this country.⁷ But that mode of punishment for this offence was wholly abolished in 1837.⁸ The only mode of punishment now

¹ 60 Geo. III. & 1 Geo. IV. c. 8. ² Plato, Leg. b. x. ³ Leg. Wisig. b. xii. pt. 3. ⁴ Menoch. de arb. 375.

⁵ Baluz. I. col. 650, 940, 1172. The ancient Scots treated blasphemy against God or the head of the clan as punishable with cutting out the tongue, and at later stages with excommunication and some disabilities.—*Hect. Boet.* b. x. And up to the year 1813 there was a punishment by public atonement in sackcloth.—Stat. 1661, c. 21; 1695, c. 11; 53 Geo. III. c. 160, § 3.

⁶ *R. v Naylor*, 5 St. Tr. 819. The Paterines, who were a sect of freethinkers who scoffed at sacraments, baptism, and matrimony, were in the twelfth century dealt with by searing their foreheads with a hot iron and whipping them half-naked through the streets, and sending them into the country in winter to starve.—1 *Pike on Crime*, 156.

⁷ *R. v Taylor*, Vent. 293.

⁸ 1 Vic. c. 23; 2 Pat. Com. (Pers.) 282.

left is fine or imprisonment, and neither of these is defined as regards the amount or extent.¹

Immoral and obscene publications.—While blasphemy in a speech or published document is an offence, however rare and difficult to deal with, unless of a gross and scandalous kind, obscenity or immorality in published documents is another ground, and is viewed in much the same light. And it is well to keep in view, that the reason why these are deemed offences is not because it is either the duty or province of the law to promote religion or morality by any direct means or punishments, but because the line must be drawn between what is and is not the average tone of morality which each person is entitled to expect at the hands of his neighbour as the basis of their mutual dealings. As the punishment of immorality was once so ambitiously undertaken by all ecclesiastical courts, it is not to be wondered, that it was in comparatively modern times, that the temporal courts became cognisant of the bounds of their own jurisdiction in this direction. The Star Chamber, which was mostly ecclesiastical in its constitution and views, claimed indeed the power of redressing all wrongs and injuries in some arbitrary and monstrous fashion of its own.² And Burke said the disembodied spirit of the Star Chamber had migrated into Westminster Hall, and haunted the courts there also with strange views about libels.³ The Court of Queen's Bench long seemed inclined to follow in the same track by calling itself the *custos morum*.⁴ And Lord Chancellor Jeffreys seemed to think this function was part of its main work.⁵ So late as 1706, when one Read was indicted for publishing an obscene libel, Holt, C.J.,

¹ 2 Pat. Com. (Pers.) 222. ² 1 Ibid. 23. ³ 17 Parl. Hist. 47.

⁴ Sedley's Case, 1 Sid. 168.

⁵ Perhaps the doctrine of the Court of Queen's Bench being *custos morum* was never more strongly put than by L. JEFFREYS, L. C., in Westminster Hall, *coram populo*, on inaugurating his successor, Herbert, C. J., in that court in 1685: "Go on; be prosperous: be undaunted and courageous; encourage all virtue and morality, suppress all vice and iniquity: be sure to execute the law to the utmost of its vengeance upon those that are now known—and we have reason to remember them—by the name of Whiggs! and you are likewise to remember the Snivelling Trimmers: for you know what our Saviour Jesus Christ says in the Gospel, that 'they that are not for us are against us.'"—2 *Collect. Jurid.* 406. This address was overlooked by Lord Campbell, the biographer.

doubted, whether the punishment ought not to be left to the ecclesiastical court.¹ On further inquiry, however, when the court was satisfied, that to destroy morality was only another way of destroying the peace and public order of society, it was held, that to publish an obscene libel was an indictable offence, and Curll was punished and put in the pillory in 1714 on this account.² L. Raymond, C.J., went the length of saying, that any immorality was indictable if it disturbed the civil order of society.³ And half a century later Wilkes was indicted, convicted, and fined for his libellous *Essay on Woman*, it being deemed scandalously indecent and an offence at common law.⁴ And the publisher of obscene poems of Lord Rochester was also indicted.⁵

Attempted definition of immoral and obscene writing.—It is impossible to define what is an immoral or obscene publication. To say that it necessarily tends to corrupt or deprave the morals of readers supplies no definite test. Fortunately there is seldom any difference as to where the line is to be drawn in singling out the offence. It is instinctively perceived by all, and in cases of doubt the decision must be left to the jury of the day, who can seldom go wrong on this matter.⁶

Seizure and destruction of obscene publications.—It has been found in modern times, that it is no sufficient remedy to punish those who publish libels, for the mischief may already have been done, and that mischief must always be indefinite. Hence attempts have been made to intercept the evil at an earlier stage, namely, when the libellous publications are in the hands of the person who is engaged in the business of circulating them. The seizing of these before circulation is the only effectual security, though it is seldom easily carried out in practice. This extension of the remedy was not effected till 1857,

¹ Read's Case, Fort. 98.

² 16 St. Tr. 154; 1 Barn. 29; R. v Curll, 2 Str. 789. Curll, when in the pillory, told the mob that he was punished for vindicating the memory of Queen Anne, and was at once popular with them.

³ 17 St. Tr. 159. ⁴ R. v Wilkes, 4 Burr. 2527, 2530. ⁵ R. v Hill, 2 Str. 790.

⁶ See, as to analogous cases, relating to indecent exposure, 2 Pat. Com. (Pers.) 362.

when Lord Campbell's Act was passed, having this as its object.¹ In case of indecent libels, no defence on the ground that it is useful to the public to know and read such matters can be entertained. And hence, where a pamphlet was published professing to expose the indecencies of the confessional, and by way of doing so repeating many obscene passages, the court held that the ulterior object, however good, did not form any defence, and that the publication was indecent.² And for a like reason a like defence of a report of a trial in a court of law, which involved obscene and indecent details, was overruled.³

Punishment for immoral or obscene libels.—The punishment of a person who publicly sells, or exposes for sale, obscene books or prints, is fine or imprisonment, and that imprisonment may be for any term now warranted by law, and also be accompanied with hard labour during all, or any part of such term of imprisonment.⁴ This being an offence at common law, the time of imprisonment is at the discretion of the court, and so is the amount of fine; and the addition may be made of surety of the peace for a reasonable time.⁵ While the law now punishes those who not only publish or sell, but who keep a stock of such publications ready for sale, it is not to be forgotten, that the mere possession by a private person is not interfered with, for in order to carry out such law the inquisition into private houses and interference with liberty would be intolerable. And even the keeping of these publications with intention to sell, taken by itself, is not an offence, so long as no overt act is done to carry out that intention.⁶ But the moment a person goes further, and obtains and procures obscene publications for the purpose of sale, then an offence begins, for the active part he takes indicates an intention to circulate them, and so to corrupt morals.⁷ And as it would be futile to punish the obtaining and procuring of obscene

¹ 2 Pat. Com. (Pers.) 366.

² R. v Hicklin, L. R., 3 Q. B. 371.

³ Steele v Brannan, L. R., 7 C. P. 261.

⁴ 14 & 15 Vic. c. 100,

§ 29.

⁵ R. v Hart, 30 St. Tr. 1344; R. v Dunn, 12 Q. B. 1026.

⁶ Dugdale's Case, 1 Dears. 64.

⁷ Ibid.

libels for sale, unless a search warrant could be issued to authorise them to be seized, this power was given in 1857 to justices of the peace, subject to certain conditions, namely the oath of the informant and the inspection or a satisfactory account of the libel, so as to show its true nature.¹

¹ 20 & 21 Vic. c. 83, § 1; 2 Pat. Com. (Pers.) 366.

CHAPTER V.

ABUSE OF FREE SPEECH BY SEDITIOUS WORDS AND WRITINGS.

Sedition generally.—While blasphemy and immorality indicate two of the extreme limits at which discussion, comment, and speculation must stop, and which surround with a barrier the thoughts and speeches exhibited in public meetings and in the public press, the third and most conspicuous limit of the same kind may be described under the general head of Sedition. The two former point to dangers and restrictions which are somewhat abstract, occasional and remote; they are seldom touched upon by the educated, the prudent, and the prosperous, and at best close in the horizon of free thought with shadowy outlines. The distance of the extreme boundary in these two cases prevents any prohibition to approach them from being felt as a serious loss. But it is otherwise with sedition, under which head are included all those libels which are aimed at our most conspicuous rulers, in which we exercise our powers of observation and give voice to our complaints, in which we discuss and animadvert upon the conduct of all those who play a part in the government of the country, and therefore in that which comes home most closely to our own business and bosoms.

The citizens of a free country differ from those of a country less free, most of all in this one characteristic, that the former are constantly animated with the consciousness that each and every part of the government—both what is imperial and what is local—exists for the good, not of the governors, but of the governed, and that the governed take an active and personal part in its whole machinery by virtue of their representatives in Parliament,

who preside over the springs of action and who both act and react on each other. The public business is the business of every intelligent citizen; in which he takes almost as close an interest as in his own personal affairs. The power, glory, and influence of his country are felt to be his own; he watches the movements of fleets and armies—the feints and protests of ambassadors—the rise and fall of ministers, as if they all drew their inspiration from his own thoughts, and as if they were doing his own business and contributing only their fair share to the common fund, in the disposal of which he has an equal voice. There is no longer recognised any divine right of government confined to any one class. Hence all the great officers of state, who take their turn of care and of temporary authority, are viewed as within his call, and as deserving well or ill, according as they divine his own mind, or ought to have divined it. Comment, criticism, censure, and praise on all public men and public affairs are thus part of his every-day thoughts, which give variety and freshness to life, and lift him above the narrow round of his own immediate occupations. He thus becomes part of the management in the greatest enterprises, and takes much of his daily pleasure in dispensing praise to his faithful stewards, and blame to those who mistook his secret instructions.¹

In a free country, or one aspiring to the highest freedom,

¹ “I should be heartily glad if some able lawyers would prescribe the limits, how far a private man may venture in delivering his thoughts upon public matters, because a true lover of his country may think it hard to be a quiet stander-by and an indolent looker-on while a public error prevails by which a whole nation may be ruined. Every man who enjoys property has some share in the public; and therefore the care of the public is, in some degree, every such man’s concern.”—*Swift’s Drapier*.

“All men may, nay, all men must, if they possess the faculty of thinking, reason upon everything which sufficiently interests them to become objects of their attention, and among the objects of the attention of free men the principles of government, the constitution of particular governments, and, above all, the constitution of the government under which they live, will naturally engage attention and provoke speculation. The power of communication of thoughts and opinions is the gift of God, and the freedom of it is the source of all science, the first fruits and the ultimate happiness of society; and therefore it seems to follow, that human laws ought not to

it is thus indispensable, that the general rule should be, that each citizen shall have all but the widest scope and encouragement to make his country's business his own, and to circulate his opinion on every detail of its multifarious affairs and on every several officer in charge of them. Yet in the exercise of this imperial faculty he must needs often touch on delicate ground. His free handling of reputations may often lead to excess of indignation, scorn, contempt, reckless personal abuse, and relentless malignant hatred. All this paper shot is but the homage paid by the ministers of a free country for the certainty of retaining in the citizens' own hands their controul over their own affairs. And as the vocation of ministers and patriots deserves the same protection, as free speech requires full play, collisions must occur and certain limits must often be touched upon and overpassed. Thus the fiercest light of freedom surrounds all that part of the liberty of speech, thought, and reputation, which is shut in by the fear of seditious libels. Voices from the crowd accompany every conspicuous step in the government. In the war of words few can hope to escape without committing some excess. It is thus of the highest importance to try and trace out the bounds where freedom ends and where the firm hand of irresistible authority commands absolute silence.¹

Right of the subject to comment on public affairs.—This right of comment on public affairs will thus be seen to be, not as it is often loosely described, a privilege, but an absolute right, like the right of the public to go on the highway. And the sole question always comes to be, whether that right has been abused, it being a cardinal rule, that while a public man cannot in a free country choose but be liable to have his conduct discussed without stint, yet he, as well as his critics, is entitled to the preservation of

interpose, nay, cannot interpose, to prevent the communication of sentiments and opinions in voluntary assemblies of men.”—*L. Mansfield, C. J.*, quoted 32 *Parl. Hist.* 318.

¹ “To inform the public on the conduct of those who administer public affairs requires courage and conscious security. It is always an invidious and obnoxious office, but it is often the most necessary of all public duties. If it is not done boldly, it cannot be done effectually, and it is not from writers trembling under the uplifted scourge that we are to hope for it.”—*Sir J. Mackintosh, R. v Feltier*, 28 *St. Tr.* 529.

his good name and reputation from wrong. If the critic wantonly or even by mistake of his own judgment actually injures the reputation of any public man, then that critic is liable to an action and an indictment for defamation, if not to the more public remedy appropriate to seditious libels.¹ A great master of the art of explaining and vindicating this right has well observed, that the questions as to the liberty of the press have always arisen on the application of the principle to particular cases. That principle is this, that every subject has a clear right freely to discuss the principles and forms of the government—to argue upon their imperfections and to propose remedies—to arraign with fair argument the responsible ministers and magistrates of the country, though not to hold them up to general indiscriminating execration and contempt. It is the office of the jury to say within which of the two descriptions any political writing is to be classed.¹ It is thus almost self evident that it is not only the right, but the duty of every citizen to speak his mind freely on each and every department of the state, and above all on the mode in which the main functions of the government are discharged. Each of the great functionaries has at best only a limited portion of the management under his immediate controul, and his duty is mostly to watch and restrain other functionaries, so as to prevent encroachment on each other's domain. But the combined result of all this watching, this zeal and patriotism, is not for the benefit of any one person or class, but for each and every individual of every class. No single individual has a greater interest than any other in maintaining in the highest efficiency the whole of the functions of government, and if it is not everybody's business, then it is nobody's business to watch with jealous care the common inheritance—to dispense praise here or blame there—to encourage, to warn, to detect, to disparage, and even to get rid of any public servant, who falls short in his public duties.

Views of the Ancients about public opinion.—Though this absolute right of free comment on public affairs may now seem an elementary principle, it was long far from being deemed so. We are told that in Solon's time the Athenians had made a decree, that it was a capital

¹ Ersk. arg. *R. v Cuthell*, 27 St. Tr. 665.

crime for any one to persuade the city to assert its right to the isle of Salamis, and Solon was thought to do a bold thing in obtaining a repeal of that law.¹ And Socrates was charged with contempt of the law for saying how foolish it was to elect their magistrates by beans; when they would never think of so electing a pilot or an architect.² And Phidias the sculptor was imprisoned for representing on Minerva's shield something that detracted from the fabulous importance of Athens.³ A Roman matron, Vilia, was accused of treason for doing no more than lamenting at her son's funeral. And Cremutius Cordus was punished for treason in calling Brutus and Cassius the last of the Romans.⁴

Early views as to comments on public affairs.—

In our own country it was long deemed impertinent for any citizen to criticise the Government or the laws. A statute of Henry VIII. made it high treason even to believe, that his marriage with Anne of Cleves was valid.⁵ In the time of Elizabeth any book which professed to dispute the details of Church government was without argument assumed to be an attempt to overthrow all Government.⁶ Cromwell indeed acted differently, and magnanimously conceded, when urged to interfere with Harrington's *Oceana*, that if a Government was fit to stand it ought to be above the fear of that kind of paper shot.⁷ The courts as well as

¹ Plut. Solon.

² Xen. Mem. b. i., c. 2.

³ Plut. Pericl.

⁴ 19 Parl. Deb. 600. ⁵ 32 Hen. VIII. c. 25. ⁶ R. v Udall, 1 St Tr. 1291.

⁷ In 1629 the Star Chamber tried Mr. Chambers, a merchant whose goods had been seized, as he thought unjustly, and who in the heat of his resentment had said, upon an inquiry about customs before the Privy Council, "that the merchants are in no part of the world so screwed and wrung as in England; in Turkey they have more encouragement." The court of twenty-four persons, including chief justices, and earls, and bishops, had no doubt whatever, that these words tended to the dishonour of the king by comparing his Government with that of the Turks, and so to create discord between him and his good people. And they fined him 2000*l.*, and committed him to the Fleet prison till he signed an abject submission, which he resolutely refused to do.—R. v Chambers, 3 St. Tr. 374. And Floyd was fined, whipped, and imprisoned for saying, that he was glad the Elector was driven out of Prague.—A.D. 1621.

In a book criticising the policy of the stage, which was then patronised by the Queen of Charles I., the author said "dancing was the devil's profession, and fiddlers were the minstrels of the devil." The judge said this was a seditious libel, which made his blood boil.

the legislature long indulged in the narrowest views of the relations between the governed and their governors. The Seven Bishops were indicted for publishing a libel, namely, a petition to the king, when all that was proved was, that they merely refused to read and publish during divine service a declaration which was believed by them to be illegal, and that by reading it they would become parties to it. One of the judges held, that for a private man to write anything against the Government was a scandalous libel.¹ In 1706 a country rector was too glad to go on

The author was sentenced to lose his ears, to be pilloried, to be fined 5000*l.*, and be imprisoned for life.—*R. v Prynne*, 3 *St. Tr.* 561.

In 1630 Leighton was prosecuted in the Star Chamber for slanderous prelacy, and was sentenced to imprisonment for life, the pillory, branding, slitting of the nose, and cutting off ears.—*R. v Leighton*, 3 *St. Tr.* 385. Richard Baxter was charged before Jeffreys, C. J., with sedition and reflecting on the prelates of the Church in his Commentary on the New Testament, and was fined, imprisoned, and bound over to good behaviour.—11 *St. Tr.* 494. He was, it is true, afterwards pardoned, and the fine remitted.—3 *Mod.* 63. The holding of a conventicle, that is to say, a peaceable meeting of people to join in public worship, was deemed seditious; and the attendance of adults at such a meeting was declared by statute punishable with three months' imprisonment.—(A.D. 1644), 15 Ch. II. c. 4. And the courts were expressly directed by a later act to construe all clauses of that Act most largely and beneficially, for suppression of conventicles.—22 Ch. II. c. 1.

¹ *R. v Seven Bishops*, 12 *St. Tr.* 183. In this case the law officers had informed James II. that the honestest paper relating to matters of civil government might be a seditious libel when presented by persons who had nothing to do with such matters, as the bishops had nothing to do with it but in time of Parliament.—*Clarendon's St. Lett.* 317. The same JUSTICE ALLYBONE, one of the judges at the trial of the Seven Bishops in 1688, thus discoursed to a jury on this topic: "No private man can take upon him to write concerning the Government at all, for what has any private man to do with the Government, if his interest be not stirred or shaken? It is the business of the Government to manage matters relating to the Government—it is the business of subjects to mind only their own properties and interests. If my interest is not shaken, what have I to do with matters of Government? They are not within my sphere. If the Government does come to shake my particular interest, the law is open for me, and I may redress myself by law. And when I intrude myself into other men's business, that does not concern my particular interest, I am a libeller. If every private man shall come and interpose his advice, I think there can never be an end of advising the Government."—12 *St. Tr.* 429.

And 110 years after the *Seven Bishops' Case*, another bishop told

his knees to a Secretary of State, and beg pardon for having criticised the Duke of Marlborough's campaigns.¹ And so late as 1808, when a publisher of a newspaper was indicted for a severe article on military flogging, the judge told the jury, it injured the military establishment of the country to have such a subject discussed, "and it was not to be permitted to any man to make the people dissatisfied with the Government under which he lives."² And even Lord Ellenborough told the House of Lords, that he saw no possible good to be derived to the country from having statesmen at the loom and politicians at the spinning-jenny.³

One great advantage of a free press is, that it tends to disperse the dangers that culminate in sedition. Bacon said that the surest way to prevent seditions, if the times do bear it, is to take away the matter of them.⁴ A great writer has also observed, that "Violence exerted towards opinions, which falls short of extermination, serves no other purpose than to render them more known, and ultimately to increase the zeal and number of their abettors. When public discontents are allowed to vent themselves in reasoning and discourse, they subside into a calm; but their confinement in the bosom is apt to give them a fierce and deadly tincture. The reason of this is obvious. As men are seldom disposed to complain till they at least imagine themselves

the House of Lords, that "he did not know what the mass of the people in any country had to do with any laws but to obey them, with the reserve of their undoubted right to petition against any particular law."—32 *Parl. Hist.* 258.

¹ 2 *D. Manchester Court & Soc.* 210. ² Wood, B., *R. v Drakard*, 31 St. Tr. 535.

³ 41 *Parl. Deb.* 1591. In France those who wrote on public affairs had been long so harassed with prosecutions that in 1799 DUCLOS said: "Gentlemen, let us speak of the elephant; it is the only rather important animal, of which we may speak without danger."—*Rapport Lib. de la Presse*, 1879.

⁴ *Bac. Ess.* 15. BURKE, with more discrimination, said: "It is right, that there should be a clamour whenever there is an abuse. The fire-bell at midnight disturbs your sleep, but it keeps you from being burned in your bed. The hue and cry alarms the country, but it preserves all the property of the province. But a clamour made merely for the purpose of rendering the people discontented with their situation, without an endeavour to give them a practical remedy, is, indeed, one of the worst acts of sedition."—17 *Parl. Hist.* 54.

injured, so there is no injury which they will remember so long, or resent so deeply, as that of being threatened into silence. This seems like adding triumph to oppression and insult to injury. The apparent tranquillity which may ensue is delusive and ominous; it is that awful stillness, which nature feels while she is awaiting the discharge of the gathered tempest. There is a buoyancy in the public mind, which, the moment an unnatural pressure is removed, seldom fails to rise up with an irresistible force and a terrible majesty."¹ Sedition often borders closely upon high treason. Lord Mansfield said, that any meeting or insurrection by force and violence to open prisons, destroy meeting-houses, raise the price of wages, alter the established religion, or to compel the legislature to repeal a law, was high treason² But while sedition treads sometimes closely on the heels of treason, in modern times words are not construed as overt acts of treason, and so are not indictable as such.³

How far a seditious libel can be defined.—The difficulty of defining a seditious libel has often been felt and pointed out as a weakness in this part of the law. Lord Ellenborough, when the peers were complaining of the impossibility of defining a blasphemous or seditious libel, volunteered to define it thus—"A libel calculated to bring his Majesty's person or the Government and constitution or either House of Parliament into hatred or contempt, or calculated to excite his Majesty's subjects to attempt any alteration of any matter in Church or State, as by law established, otherwise than by lawful means."⁴ Lord Camden also said, he had long endeavoured to define what a seditious libel was, but had not been able to find any definition which either met the approbation of his own mind or could be deemed satisfactory to others. Some would have every censure on the measures of Government considered as a libel. If this was the case, every channel of public

¹ *R. Hall*, Apol. Press, Sect. 2. ² *R. v Lord G. Gordon*, 21 St. Tr. 646. ³ *Kelyng*, Treas. 29; *Foster*, Cr. L. 200.

⁴ 41 *Parl. Deb.* 966. Mackintosh and others complained of this as a confused definition, and ended by saying it was impossible to give any definition.—41 *Ibid.* 1540. "Those who slowly built up the fabric of our law never attempted anything so absurd as to define by any precise rule the obscure and shifting boundary which divides libel from history or discussion."—*Sir J. Mackintosh*, *R. v Peltier*, 28 St. Tr. 529.

information would be converted into a mere vehicle of panegyric. The voice of truth would cease to be heard amidst the notes of adulation. Others again would have only groundless calumnies on Government regarded as libels. But who were then to decide? To whom was it left to pronounce, whether what was called calumny was well or ill founded? It was of consequence that this power should be placed in hands, where it was neither liable to abuse nor open to corruption. By being placed in the hands of juries, it afforded the most probable means of safety, and became the best instrument of justice.¹ Hence Lord Kenyon observed, that practically all that could be said was, that whatever twelve of his countrymen thought blamable was libellous, and what they thought not blamable was not libellous.²

What is the essence of seditious libel.—From what has preceded it will be obvious, that sedition is more than a vague general discontent with the mode of government

¹ 29 Parl. Hist. 732.

² "After all, the truth of the matter as to the liberty of the press is very simple when stripped of all the ornaments of speech, and a man of plain common sense may easily understand it. It is neither more nor less than this, that a man may publish anything which twelve of his countrymen think is not blamable, but that he ought to be punished if he publishes what is blamable. This, in plain common sense, is the substance of all that has been said upon the subject."—*L. Kenyon, C. J., R. v Cuthell, 27 St. Tr. 675.*

Another experienced statesman also observed: "The most eminent judges had been able to give no clearer definition of a seditious libel than that it comprehended whatever was calculated to bring the Government into hatred and contempt. Such a description, it was obvious, would be thought to apply or not to any particular writing, according to the different views and various reasonings of various minds; and where such various judgments might be formed it was evident, that jurymen would exercise their judgments and modify their sentence by a reference to the consequences which should attach to it."—*M. Lansdowne, H. L., 41 Parl. Deb. 715.*

A Protest of the Peers in 1819 well stated, that the "offence of publishing a libel is, more than any other that is known to our law, undefined and uncertain. Publications which at one time may be considered innocent and even laudable may at another, according to circumstances and the different views of public accusers, of judges, and of juries, be thought deserving of punishment, and thus the author or publisher of any writing dictated by the purest intentions on a matter of public interest, without any example to warn, any definition to instruct, or any authority to guide him, may expose himself to a long imprisonment and a heavy fine."—*41 Parl. Deb. 747.*

existing. The essence of seditious libel may be said to be its immediate tendency to stir up general discontent to the pitch of illegal courses, that is to say, to induce people to resort to illegal methods other than those provided by the Constitution, in order to redress the evils which press upon their minds. If laws are unjust, the legal method is to petition Parliament to amend them. If a minister is obnoxious, the legal method is to petition the Crown to remove him, and failing that to dismiss at the next opportunity those members of Parliament who support him. Whenever a writing is so framed as to urge strongly the people, and especially the ignorant and turbulent portion of the people, to take some shorter and illegal method, not at a future time, but at once, of attaining the end in view, then it may be said to be a seditious libel. And hence the construction to be put on the language, unlike the general rule in most other cases, is not what reasonable men would understand by it, but rather what the ignorant and excited people of the day would be likely to do after hearing or reading it. The difficulty of defining a seditious libel is thus inherent in the subject matter, for no limit can be set to the topics, the men, and the measures that may be spoken of and commented upon. The utmost certainty attainable is to say, that whenever a speech or writing imputes personal corruption or scandalous misconduct or ignorance in such terms as to incite others to get rid of the obnoxious person by other and speedier methods than the ordinary remedies prescribed by the law, then to that extent and no further it is a seditious libel. This effect of the libel on others in stirring their passions and leading them to violent courses is sometimes deemed the gist of the offence.¹ But any excess in the degree, the adequacy, the justification of the language must always remain to be settled by means of a jury. He who, as Erskine observed, wishes to avoid sedition, must not excite individuals to withdraw from their subjection to the law, by which the whole nation consents to be governed. He must not strike at the security of property, or hint, that anything less than the whole nation can constitute the law, or that the law, be it what it may, is not the inexorable rule of action for every individual.²

¹ *R. v Sullivan*, 11 Cox, C. C. 47.
22 St. Tr. 357.

² *Erskine, arg. R. v Paine*,

A seditious libel therefore in its shortest definition consists in "any words which tend to incite people immediately to take other than legal courses to alter what the Government has in charge."

Thus it was once said, that whenever a paper has a direct tendency to cause unlawful meetings and disturbances and to lead to a violation of the laws, that is sufficient to bring it within the terms of an indictment, and it is a seditious libel.¹ Thus also where a public meeting held at Birmingham once passed a resolution, that "a flagrant outrage had been made upon the people of Birmingham by a blood-thirsty force from London (of constables)" and that "the people of Birmingham are the best judges of their own power and resources to obtain justice," the jury were told to consider, whether this resolution contained no more than a calm and quiet discussion, allowing something for a little feeling in men's minds (for persons in an excited state do not discuss subjects calmly). If so, it would be no libel. And the jury were to consider "whether the resolutions meant the regular mode of proceeding by presenting petitions to the Crown or either House of Parliament, or by publishing a declaration of grievances, or whether they meant, that the people should make use of physical force as their own resource to obtain justice, and meant to excite them to tumult and disorder." The jury found the defendant guilty.²

Importance of juries in defining seditious libels.—Such being the difficulty of defining seditious libels, the law restraining them—the law that teaches how to foresee and avoid them—would often be inscrutable, if it were not, that in all cases it rests with the jury, that is to say, with a certain number of fellow citizens fairly selected and

¹ Littledale, J., *R. v Lovett*, 9 C. & P. 466.

² Littledale, J., *R. v Collins*, 9 C. & P. 461. In one case, in 1797, the prisoner was charged with seditious words at a meeting in favour of annual parliaments and universal suffrage. He said that "it was their object to obtain reform by every peaceable means in their power, for it would be shocking to shed the blood of their fellow creatures; but if the Government continued obstinate, and force was necessary, he hoped there was not a citizen in the room but would shed his last drop of blood either in the field or on the scaffold." And the jury found him not guilty, obviously thinking that force was not recommended.—*R. v Binns*, 26 St. Tr. 595

capable of estimating the dangers of license on the one hand and of tyranny on the other hand, to decide not only what is the fact, but what is the law. And no man can be declared guilty of transgressing the limit of free speech or writing without their consent and acquiescence in some form or another. Words which were formerly deemed seditious would now be deemed mere expressions of abstract opinion as to the best forms of government, and such are now tolerated both within and without the walls of Parliament as the inevitable result of freedom of thought. And all men of moderate education can scarcely fail to acquire an instinctive appreciation of the standard of license and decorum.¹

Proclamations of the Crown as to seditious meetings.—The difficulty of putting an end to a general and systematic excess in free speaking and writing bordering on sedition has sometimes induced the Government of the day to resort to the good advice of the Crown as a means of allaying a feverish excitement. In 1792 the Crown issued a proclamation as to seditious writings, the bad effects of which were described, and it charged all magistrates to make diligent inquiry to discover the authors and printers. But Mr. Grey complained of this as defamatory, malicious, and impolitic, and one of the lords denounced it as most malignant and impotent, for if there were offenders, the proper course was to prosecute them, and not urge magistrates to become spies and informers.² And opinions have generally been divided as to the policy of such a step, while it is admitted that it supplies nothing in the form of a legal remedy. As will be seen hereafter, it sometimes also happens, that Parliament itself

¹ "Comments on Government, on ministers and officers of state, on members of both Houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subjects of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt the public are gainers by the change, and that though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties." — *Wason v Walter*, *L. R.*, 4 *Q. B.* 94.

See further as to juries deciding the fact as well as the law, *post*.

² 29 *Parl. Hist.* 1480.

intervenes, and by its own authority takes notice of libels, even though not aimed specially at itself, declaring them to be libels, but, nevertheless, not dealing further with the libeller. This also little advances the remedy. In one noted case the House of Commons had resolved, that a particular publication was a seditious libel, but this resolution was held nowise conclusive, when an indictment for the same publication came to be tried; and it was left to the jury to find whether they thought it to be so, and the jury held it was no libel.¹

Sedition at public meetings.—There is nothing peculiar to sedition which is written and published which does not extend to seditious speeches; and the limits are the same in both cases, except that as the effect of speaking is usually ephemeral and transitory depending on the occasion and the numbers, and above all the conduct of the audience, a remedy might be resorted to in one case which would be deemed superfluous in the other. A seditious speech, if it have any effect at all, usually operates instantaneously, and the extent of the evil can usually be estimated from the conduct of the day; while published libel is far reaching, and may become more obnoxious as time advances. Public meetings held for discussion of public affairs are sometimes used only as a cloak for demonstrations of physical force, and with the secret intent of overawing the Government and concussing it. Lord Abinger, C.B., is said to have charged the jury at a trial of Chartists, that to summon a meeting of 3000 or 4000 people to discuss things, or form a deliberative assembly, was a farce; and if an assembly was such as to render all notion of serious debate impossible, and if the only object was to hear one side, then it could not be viewed as anything but illegal.² Yet great allowances must be made in times of excitement as to what is legitimate to be considered and put forward at public meetings. As Erskine observed, "It was often said, that bold language was held at public meetings; it was certainly bold to say, that the people had a right to resist and that they ought to rise, but there were some occasions which rendered the boldest language warrantable."³

¹ R. v Reeves, 2 Peake, N.P.C. 84; R. v Stockdale, lb. 86.

² 66 Parl. Deb. (3) 1050.

³ 32 Parl. Hist. 313. LORD CHATHAM, on a great occasion, said:

Unpublished seditious writing.—Such was the disregard of principle by the judges of a former time, that Peacham, a clergyman, was found guilty of treason for certain words in a sermon found in his study, which had never been published, nor was ever intended to be preached.¹ And the same was held as to an unpublished paper on the *rationale* of Government found in Algernon Sidney's study, and never published, Judge Jeffreys holding that the writing was *per se* an act of treason.² But while mere words or mere unpublished writings cannot be construed into an offence against the government in the nature of seditious libel, yet when the writing is published and can be construed into a compassing the death of the Sovereign, then it is nothing less than an overt act of treason.³

Libels on the Sovereign.—In the free play of speech and writing, whenever a seditious tendency was indulged, it was in former times inevitable, that the conduct of the Sovereign should be marked out for comment. In any circumstances great delicacy of treatment is here imperative. In a constitutional country the whole strength of blame can be sufficiently directed against the ministers and advisers, who are deemed responsible for all the great issues of affairs. In this view it is a maxim of law, that the Sovereign can do no wrong, and hence whatever grievance

"If the king's servants will not permit a constitutional question to be decided on, according to the forms and on the principles of the Constitution, it must then be decided in some other manner; and rather than that it should be given up—rather than the nation shall surrender their birthright to a despotic minister, I hope, old as I am, I shall see the question brought to issue and fairly tried between the people and the Government."—16 *Parl. Hist.* 747.

To which ERSKINE added: "I was born a free man, and I will never die a slave."—32 *Parl. Hist.* 313.

Fox also observed: "When the power of public speaking was taken away, what was there left but the patience of implicit submission: what hopes could be entertained that grievances would be removed, when those who felt them dared not complain?"—32 *Parl. Hist.* 352.

¹ Peacham's Case, Cro. Ch. 125; Foster, 199.

² Sidney's trial, 9 St. Tr. 889, 893; Foster, 198. An Act of Parliament afterwards was passed, in 1689, to reverse that judgment.—9 St. Tr. 996. And see further, *post*, as to the effect of publication and its evidence.

³ 25 Ed. III. c. 2; Hale, P. C. 118; Foster, 198; Williams' Case, 2 Roll. Rep. 88; 3 Inst. 121. See *post*, p. 91.

exists to engage the public mind, the nature of the redress being entrusted to some responsible ministers, the matter can always be exhausted, without requiring to deal with the conduct of more than a few constitutional advisers. In the minds of all good citizens the character of the Sovereign is sacred, and little embarrassment in modern times has arisen in separating topics that are in no way necessarily connected with each other. All such difficulties are rather things of the past. Moreover seditious speeches and writings are to be distinguished from those which are treasonable, for treason, being an offence personal to the Sovereign, all that relates to it falls more properly under that division of the law treating of "Government."

The older doctrines as to speaking against the Sovereign.—In ancient times libels on the Sovereign were not so easily disposed of, and occasioned great difficulty. When the Emperor Augustus was called to power, it was made a penal offence to call him a boy.¹ And it is said that he was once disposed to punish severely a historian who passed some stinging jests on him and his family, but Mæcenâs advised him that the best policy was to let these pass and be forgotten.² Cæsar said that to retaliate was only to contend with impudence and put oneself on the same level.³ And even Tiberius acted on the same view.⁴ The Theodosian Code also made this the law, and expressly declared, that slanderers of majesty should be unpunished, for if this proceeded from levity, it was to be despised; if from madness, it was to be pitied; and if from malice it was to be forgiven; for all such sayings were to be regarded according to the weight they bore.⁵ In our own country statutes were often passed to protect the sovereign. The statute of Edward I. described it as an offence to publish false news or tales, whereby discord might grow between the king and his people.⁶ To say that the king was not the

¹ 32 Parl. Hist. 518. ² Suet. Aug.; Dion Cass. b. lii. ³ Aul. Gell. b. vi. c. 11.

⁴ Suet. Tib. It has been said that slanders are very much to be feared, when they are expressed in witty sayings, for people delight to repeat them.—*Chev. de Mere, Disc. de la Convers.*

⁵ Theod. Code, Si quis Imper. And it is related in modern times, that Catherine de Medicis and Francis I. allowed themselves and their ministers to be satirized in comedies without stint.—*Balzac, Epist.*

⁶ 3 Ed. I. c. 34; Britt. b. i. c. 21, *ante*, p. 53.

rightful king, or that another was so, was deemed treason in the time of Edward IV.¹ And the same decision was repeated in the time of George II., when an allegorical description was given in *Mist's Journal*.² A Welsh bard was executed in 1541 for singing prophecies against the king. The statute of 1554 punished the inventing and repeating of false news about the king or queen with the pillory and loss of both ears, and the publication of the same inventions with the loss of the right hand.³ In the time of Queen Elizabeth it was made an offence to make pretended conjuration of the queen's death.⁴ And for writing about her marriage with the Duke of Anjou, Stubbes was sentenced to have his right hand cut off.⁵ Even in the time of James I. a barrister was convicted of high treason and executed for uttering a prediction, that the king would die in a certain year, which he specified.⁶ And a statute of Anne made it high treason to maintain in writing or print, that the king and Parliament could not regulate the succession to the crown.⁷ When Wraynham said of King James I., "He is but a man, and so may err," the judge said it was scandalous, for it implied error in the king; and the defendant was fined 1,000*l.*, was made to ride with his head to the horse's tail, and had his ears lopped.⁸ Yet the judges held, that to speak words stating that the king was the greatest drunkard in the kingdom was no treason.⁹ In 1605 the Lord Chancellor took the opinion of the judges as to certain petitions of the Puritans, and they and all the Star Chamber held that a petition to the king which intimated, that "if he denied their suit many thousands of his subjects would be discontented," was an offence very near to treason, and it was finable by discretion, for it tended to raise sedition, rebellion, and discontent among the people.¹⁰ And the judges also held it was finable to say of the king, that he intended to grant toleration to Papists, especially as the king had protested that "before he would do such a thing he would spend the last drop of blood in his body."¹¹ In Peacham's

¹ Germaine's Case, 2 Ed. IV. 3 St. Tr. 362. ² Holt's Libel, 96.

³ 1 & 2 Ph. & M. c. 3, *ante*, p. 54. ⁴ 5 Eliz. c. 15. ⁵ 1 Hallam, Const. Hist. c. 5. ⁶ R. v Williams, 2 Roll. Rep. 88. ⁷ 4 & 5

Anne, c. 20, § 1. ⁸ 6 L. Bacon's Lett. 311. ⁹ R. v Williams, Cro. Ch. 126; 3 St. Tr. 368. ¹⁰ 8 Somers' Tracts, 122. ¹¹ Cro.

Jas. 38.

case the judges held, that to charge the king in a writing which was never published, that "the king might be stricken with death, and that the people will rise against him for taxes and oppressions," was treason, though many of the judges thought it was not.¹ In 1628 one Pine said of Charles I., that "he was as unwise a king as ever was: he was carried as a man would carry a child with an apple: and that he was no more fit to be king than Hickwright (an old simple fellow who was Pine's shepherd)." All the judges met and considered, whether this amounted to high treason or what else, and they resolved that these words, wicked as they might be, were not treason.² And to protect Charles II. against being called a heretic or Papist, a special statute was passed, limited to his life.³ A solicitor in a coffee-house, when provoked by some impertinent questions, once hastily said, "I am for equality and no king." He was prosecuted and found guilty, imprisoned, pilloried, and struck off the rolls.⁴

Modern cases as to seditious writings against the Sovereign.—The more modern cases show greater and greater difficulty, owing to the feelings of juries, who are difficult to controul. In the case of Wilkes, who in the *North Briton*, No. 45, substantially attacked the personal honour and veracity of the king and his Government, and thereby, as was alleged, tended to excite tumults and

¹ Peacham's Case, Cro. Ch. 126; 3 St. Tr. 870. ² Pine's Case, 3 St. Tr. 368.

³ 13 Ch. II. c. 1; 32 Parl. Hist. 518: It was held not treason for a defendant to publish, that King Charles II. had abused his power to the overthrow of religion, laws, and liberties, and that the people ought to resist.—*R. v Brewster*, *Holt, Lib.* 87. In 1660 one Lenthall was reprehended for saying in the House of Commons, that, he who drew his sword against the king committed as high an offence as he that cut off the king's head.—4 *Parl. Hist.* 42. Whitelocke, for giving a private legal opinion that a certain commission of the Crown was illegal, was charged before the Star Chamber with contempt of the prerogative, and he was only discharged after his submission.—1 *Hallam, Const. Hist.* c. 6. A publisher of *Mist's Weekly Journal* was found guilty of publishing, that the king's legitimacy and title to the Crown were called in question under the form of an allegory.—*R. v Clarke* (A.D. 1729), *Barnard.* 304. To publish, that the late sovereign misapplied, wasted, and dissipated the treasure of the kingdom, was held a seditious libel.—*R. v Shebbeare*, *Holt, Lib.* 89.

⁴ *R. v Frost*, 22 St. Tr. 471.

insurrections, he, as being the author, and also those who were the printers and publishers of the libel, was found guilty.¹ The case of Junius' letter to the king, in which, as the Attorney-General urged, every bad quality was imputed to the king, and every good quality was denied to him, was a striking example of the difficulty of foreseeing how juries might deal with circumstances supposed to be so near the dividing line between lawful public comment and seditious excess. In the first of several trials for publishing that memorable letter, the jury found the publisher guilty.² In the two other trials for the same publication the jury, after deliberating seven and ten hours respectively, gave a verdict in favour of the publishers of not guilty.³ The other prosecutions in respect of the same libel were then abandoned by the advisers of the Crown without a trial, as not likely to be successful. In the case of Perry, who said "the king was not popular," this was deemed no libel.⁴ In one case the author of a pamphlet set forth as a doctrine of the Constitution, that "the kingly office may go on in all its functions without Lords or Commons; from the king alone we unceasingly derive the protection of the law;" the House of Commons resolved, that this was a high breach of the privileges of that House, and ordered the Attorney-General to prosecute. The jury, however, found the author not guilty.⁵

To say that "it would be well if there was a total change of system, and that the successor of the present Sovereign would have the finest opportunity of becoming nobly popular," may, when taken with the context, mean little more than that the Sovereign had erred honestly and been misled by his counsellors, without implying any corrupt motive or intention to oppress or favour any class of men. And it need not be construed to imply any thing which necessarily tends to bring the Sovereign into

¹ *R. v Wilkes*, Holt, Libel, 97. ² *R. v Almon*, 20 St. Tr. 839.
³ *R. v Woodfall*, 20 St. Tr. 903; *R. v Miller*, 20 St. Tr. 895. ⁴ 38
 Parl. Deb. (3) 479.

⁵ *R. v Reeves*, 26 St. Tr. 530. In another case, where the defendant published in his newspaper that the Emperor of Russia was a tyrant to his own subjects and ridiculous in the face of Europe, and had prohibited the exportation of timber, the jury found him guilty.—*R. v Vint*, 27 St. Tr. 642.

contempt and hatred. If so, then it is no libel, and cannot be interfered with.¹ In that case Lord Ellenborough, C. J., said, that "if a person who admits the wisdom and virtues of his Majesty laments, that in the exercise of these he has taken an unfortunate and erroneous view of the interests of his dominions, he was not prepared to say that this tends to degrade his Majesty or to alienate the affections of his subjects. He was not prepared to say that this is libellous; but it must be with perfect decency and respect, and without any imputation of bad motives. If the writer were to go one step further and say or insinuate, that his Majesty acts from any partial or corrupt view, or with an intention to favour or oppress any individual or class of men, then it would become most libellous."² In another case a newspaper published the following: "It is with the deepest concern we have to state, that the malady under which his Majesty labours is of an alarming description, and may be considered hereditary. It is from authority we speak." A criminal information having been filed, and a trial had, it appeared that the publisher had no authority for the statement. The judge told the jury it was a criminal act to publish of any man that he was insane, and as the defendant admitted it was false, this was a libel. The court held this was a right direction, and it was also right to tell the jury, that he who publishes matter calculated to defame must be presumed to have intended to defame, unless he shows the contrary; in other words, that malice was implied.³

Recent statutes against intimidating the Sovereign.—In the time of Edward III. any person compassing the death of the Sovereign being guilty of treason, much difficulty existed as to what was an overt act amounting to such compassing.⁴ In 1796 and 1817 any compassing of personal injury to the Sovereign or of levying war in order to compel by force or constraint the Sovereign or his successors to change his measures or counsels, or to intimidate either House of Parliament, and when put in writing and published, was declared to amount to treason.⁵

¹ *R. v Lambert*, 2 Camp. 402. The jury returned a verdict of not guilty in this case, which was an indictment of the publisher of the *Morning Chronicle* in 1809.

² *R. v Lambert*, 2 Campb. 402; 22 St. Tr. 953. ³ *R. v Harvey*, 2 B. & C. 257. ⁴ 25 Ed. III. c. 2. ⁵ 36 Geo. III. c. 7; 57 Geo. III. c. 6.

And the statute of 1796 made any writing, speaking, or preaching, which incited to a hatred or contempt of majesty or the Government, a high misdemeanour.¹ And that law continued until 1848, when it was repealed and superseded by another enactment, which is now in force. By this later Act, whoever intends to levy war against her Majesty in order by force to compel her to change her measures or counsels, or in order to intimidate either House of Parliament, or move foreigners to invade the kingdom, if such intention be expressed by printing or open and advised speaking, or by any overt act, then he is guilty of felony.²

Libels on ministers of state.—The same consideration which protects the Sovereign from libels extends in a large degree to the ministers of state, as part of the executive Government. There must be ministers, and there must be credit given to these ministers that they know their duties, rights, and powers, and that they give to these their best attention, free from corruption and the vices incident to the exercise of all but absolute authority.³ Holt, C. J. said, that

¹ 36 Geo. III. c. 7, § 2. The words were: "Whoever maliciously and advisedly, by printing, preaching, or speaking, uses words to incite or stir up the people to hatred or contempt of his Majesty, his heirs or successors, or the Government and Constitution as by law established, commits a misdemeanour, punishable as in other cases, and on a second offence is punishable with seven years' transportation." Fox said under that Act freedom became a mockery.—32 *Parl. Hist.* 272.

² 11 & 12 Vic. c. 12; Stat. L. Rev. Acts, 1871, 1875; 20 & 21 Vic. c. 3; 27 & 28 Vic. c. 47. The punishment is imprisonment for two years, or penal servitude for life or seven years. The remedy for spoken words must be prosecuted in six days, and no costs are to be allowed to the prosecutor. Two witnesses are required.

³ "It is for the interests of society, that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks on them destructive of their honour and character and made without any foundation. The true position is this. Where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives, which arise fairly and legitimately out of his conduct, so that a jury shall say, that the criticism was not only honest but also well founded, an action is not maintainable. But it is not because a public writer fancies, that the conduct of a public man is

to assert, that corrupt officers are appointed to administer affairs is a reflection on the Government, and tends to beget an ill opinion of the administration of the Government.¹ Criticisms which make no fair allowances to these public servants as being honestly desirous to do their work well, and imputing corruption or dishonesty, or any other personal vice incompatible with a high sense of duty, are thus treated as libels. Nearly all the questions arising out of libels on ministers of state turn on this point, whether some gross personal vice or moral defect is attributed to individual members of the Government. This is sometimes described as bringing Government into contempt, or exciting sedition, these being the necessary consequences of such imputations. But the modern practice is to disregard many imputations which formerly were made matter of prosecution as seditious. To charge folly, or imbecility, or incapacity to a member of the Government may be quite compatible with avoiding undue license or the imputation of malice or corruption, and this is said to be, because honest, well-meaning men do as great public mischief as those who are able but unprincipled. If therefore the drift of the public writer is not to discuss the matter in its bearings on public interests, but to impute dishonesty to the individual minister, the writing is a libel. And it is not the less libellous because any one individual of the Government may not be specified or indicated, if the whole, that is to say, several of the high officials are clearly included, as was the case where Tutchin alluded to "the influence of French gold on the conduct of affairs, and accused those who had the management of the navy of ignorance and incapacity."²

open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest."—*Per Cockburn, C. J.*, *Campbell v Spottiswoode*, 3 B. & S. 777.

¹ *Tutchin's Case*, 14 St. Tr. 1128.

² *R. v Tutchin*, 14 St. Tr. 1095. In *R. v Luxford*, in 1791, a publisher of a newspaper was found guilty of a libel for arguing, that the real object of a certain naval expedition was not what it professed to be—"that the ministry had deluded the people, and acted without policy, prudence, or spirit."—29 *Parl. Hist.* 558. It was also once held, that to charge a Government with intending to violate a public treaty with a foreign Government, and with being enemies to the public good, was libellous, according to the mode of treating the subject and the circumstances of the time.—*R. v Franklin*, 17

Cobbett, in 1804, published a letter charged with invective, and among other things spoke of Lord Hardwicke, Lord Lieutenant of Ireland, and Lord Redesdale, Lord Chancellor of Ireland, as "a very eminent sheep feeder from Cambridgeshire, assisted by a very able and strong-built chancery pleader from Lincoln's Inn." The prosecution urged, that this letter had for its purpose to degrade and vilify the whole administration of government in Ireland, and to expose it to the scorn and execration of the Irish people. His counsel defended it as fair ridicule and good English humour, having the object of "supporting the good Government of Ireland and the removal of the present inefficient administration." Lord Ellenborough, C.J., told the jury, that "if a publication be calculated to alienate the affections of the people by bringing the Government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime." And in commenting on passages the judge suggested, that it was instigating the people to rebellion. The jury found Cobbett guilty.¹ And in 1820 Sir F. Burdett was convicted of a seditious libel for publishing, that "divers liege subjects were inhumanly cut down and killed by his Majesty's troops" at a certain place in a riot.² Hunt was prosecuted for an article in the *Examiner* newspaper commenting on the excess of flogging in the army, a sentence of one thousand lashes having been ordered in one case; and though the judge, Lord Ellenborough, told the jury, that it was a libel and intended to excite disaffection in the army, the jury found a verdict of not guilty.³

When ministers of the day are charged with some personal dishonesty or corruption, they have the same

St. Tr. 626. To publish a writing that his Majesty's troops inhumanly murdered innocent subjects on an occasion specified was held to be a seditious libel.—*R. v Horne*, 20 *St. Tr.* 651; *Cowp.* 672.

¹ *R. v Cobbett*, 29 *St. Tr.* 54. Mr. Justice Johnson, an Irish judge, was known to the author, and Cobbett was never called upon to receive sentence.

² *R. v Burdett*, 4 B. & Ald. 95.

³ *R. v Hunt*, 31 *St. Tr.* 367. In another case, however, relating to the same libel, the jury found the publisher guilty.—*R. v Drakard*, 31 *St. Tr.* 495.

remedies as others, apart from a state prosecution. Thus in 1786, when Pitt, the Prime Minister, was charged by the *Morning Herald* with gambling in the funds and fraudulently availing himself of official information to make money on the Stock Exchange, and that "his friends were deeply grieved by the discovery, but were trying to palliate his misconduct," he sued the publisher for damages. Erskine, for the defendant, admitted there was no justification, and Lord Mansfield told the jury to remember, this was a very serious question, in which all the public were concerned, namely, whether there shall be any protection to the reputation of honourable men in public or private life. The jury gave a verdict of 250*l.* damages.¹

Libels on the Constitution.—It has sometimes been said that besides speeches and libels charged with sedition by way of exciting the people against the Sovereign or the ministers, there may be also a libel which defames and wantonly attacks the Constitution itself. But as the Constitution is at best an abstraction, it may well seem idle and hypercritical to interfere with any one for commenting on such a subject. And judges in former times have sometimes used sweeping language such as would utterly suppress free speech or thought on almost any political subject, for most people are constantly finding fault with the Constitution in one respect or another, and without allowing free scope to such fault-finding there would never be reformation or amendment in anything. All those indictments and informations for what are called libels on the Constitution really resolve themselves into one or other of the specific libels already mentioned, and to go further is usually to interfere with the inherent rights of freedom. It is true, that in certain states of public feeling what may otherwise be innocent language is viewed as an incentive to public disorder and tumult, and hence the surrounding circumstances cannot but enter largely into the construction of all libellous writings and speeches, when charged with promoting sedition. And this part of such business, it will be seen, is well confided to a jury. Political writers cannot be tied down closely to the

¹ 1 Polit. Anecd. 360.

subject matter of their animadversions, and all attempts of courts to define the limits of this kind of discussion have as already stated been unsuccessful. Parliaments as well as the courts have in recent times become much more liberal in dealing with political libels, for, as Cobbett said, there is always an appeal from the tellers of the Houses of Parliament to the tellers of the nation.¹ As a great master has observed:—"If in the march of the human mind no man could have gone before the establishments of the time he lived in, how could our establishment by reiterated changes have become what it is? If no man could have awakened the public mind to errors and abuses in our government, how could it have passed on from stage to stage, through reformation and revolution, so as to have arrived from barbarism to its modern pitch of happiness and perfection?"² "Government has at all times been in its own estimation a system of perfection; but a free press has examined and detected its errors, and the people have from time to time reformed it."³

Some examples of libels against the Constitution.—

Arguments and discussions now perfectly innocent and almost part of common knowledge, or at least admitted to be open questions, formerly had serious consequences. There have been in former times instances of these libels against what may be called the existing form of government, where courts and juries have found the author of the libel guilty. Thus to argue, that, in case of the Sovereign abusing his powers, the subjects may and ought to resist with force of arms, was once punished.⁴ In another case the writer, after justifying the regicides, said, that a rebellion against one estate of the realm is not properly rebellion at all, for that there could only be rebellion against the three estates collectively. And he was found guilty.⁵ Again it was equally a crime to argue, that the revolution settlement was the destruction of the laws of England.⁶ In one case the author of a treatise on hereditary right was held guilty, though he made no reflection on any part of the existing

¹ R. v Cobbett, 29 St. Tr. 69.

² *Erskine, arg.* R. v Paine, 22

St. Tr. 357. ³ *Ibid.*

⁴ R. v Brewster, 15 Ch. II. Holt, Lib.

87. ⁵ R. v Harrison, 3 Keb. 841; Vent. 324.

⁶ R. v Brown, Holt, Lib. 87.

government.¹ And Sacheverell was impeached for inveighing too much in the abstract against the Revolution settlement, though his prosecutors in turn suffered from the reaction, after he was found guilty and was suspended from preaching for three years. So late as 1754 Nutt was convicted of a seditious libel for publishing, that the Revolution was "an unjustifiable and unconstitutional proceeding."² Dr. Shebbeare was convicted and sent to the pillory for writing that "the calamities of the nation were due to the influence of Hanover, and that the Revolution was the foundation of all our evils and calamities."³ Few can now rise to such a pitch of enthusiasm as led Fox in 1774, proud of "the hero without vanity or passion," to denounce "a libel on the glorious Revolution," Fox said "that was one of the vilest libels on the Constitution of this country that ever was published; it was not an abuse of this person or that person, but of the Constitution of this kingdom; it was a libel upon the glorious Revolution in 1688, and it terms expressly that revolution a rebellion against King James."⁴ And the House ordered the Attorney General to prosecute the author and publisher. And Paine, in 1792, was convicted of a seditious libel for vilifying the Révolution, the Bill of Rights, the Legislature, and the Government generally.⁵

Arresting publishers of seditious or blasphemous libel.—A century ago, owing to the dangerous consequences of seditious libels, it was thought that any Secretary of State might issue his general warrant to authorise the unknown author and printer to be searched for and arrested, and their houses to be examined and papers to be seized; but in the notable instance of Wilkes that notion

¹ R. v Bedford, 2 Str. 789. ² R. v Nutt, Holt, Lib. 88. ³ R. v Shebbeare, A.D. 1758, Holt, Lib. 89. ⁴ 17 Parl. Hist. 1055.

⁵ R. v Paine, 22 St. Tr. 357. In 1842 Mason, a Chartist lecturer, was haranguing the audience and telling them that the laws were made by the aristocracy, and that the people had no voice in the election of their representatives, &c., when a constable interfered and took Mason into custody. Mason was afterwards convicted at Quarter Sessions of aiding in an illegal assembly, and he was sentenced to six months' imprisonment. The HOME SECRETARY and ATTORNEY-GENERAL POLLOCK said, that a constable on hearing seditious language may, at his own risk, apprehend the party using it; and that a constable hearing language which had an immediate tendency to produce a breach of the peace was entitled to interfere as he did. —65 Parl. Deb. (3d) 600.

was for ever dispelled.¹ It is true that, under the general law relating to all criminal offences, a person who publishes or prints a seditious libel may be summoned before a justice of the peace, and the charge against him, with a view to indictment, regularly inquired into. But there is no such practice competent as a summary arrest, unless in course of such inquiry a warrant should be issued, in which case it must name the person who has been charged.² Before the Act of 1848 passed, which authorized justices of the peace to inquire, the Secretary of State in 1817 sent a circular to recommend the justices in all cases of blasphemous and seditious pamphlets to issue a warrant to arrest the individuals found selling or publishing these, and to hold them to bail to answer the charge. And this circular was supported by the opinion of the law officers of the Crown.³ But blasphemous and seditious libels differ from other criminal offences in this, that not only justices of the peace may issue a warrant to arrest the individual libeller, but also the Secretary of State may do so. The origin of this power is obscure, and may be traceable, as Lord Camden suggested, to some confused notion that part of the royal prerogative had been delegated to this high officer for a purpose closely connected with the preservation of the public peace.⁴ Still it is settled by authority, that, though the Secretary of State can neither administer an oath nor hold to bail, yet he can issue a legal warrant to arrest one who has published a blasphemous or seditious libel.⁵ The

¹ See 2 Pat. Com. (Pers.) 129. The mistake in issuing the general warrant in Wilkes' case cost the Government 100,000*l.*—*Rae's Wilkes*, 45.

² See the requisites set forth.—2 Pat. Com. (Pers.) 150, 152.

³ 36 Parl. Deb. 450. ⁴ Per L. Camden, *Entinck v Carrington*, 19 St. Tr. 1045; 2 Wils. 275; *Butt v Conant*, 1 B. & B. 566.

⁵ *R. v Derby*, Fort. 140; *R. v Easbury*, 8 Mod. 177; *R. v Kendal*, Salk. 347; 5 Mod. 78; *R. v Shuckburgh*, 1 Wils. 29. In the case of Derby, the printer of a seditious libel in the *Observer*, a Secretary of State issued a warrant to arrest him as the publisher, and no time for examination being stated, the court held it a good warrant, and said it had been so settled in the time of Queen Elizabeth.—*R. v Derby*, *Fortesc.* 140. The protesting peers, in 1763, put this point, so far as it bore on members of Parliament as well as the general public, strongly: "By this doctrine (that privilege of Parliament does not apply to seditious libels) every man's liberty, privileged as well as unprivileged, is surrendered into the hands of a Secretary

rest of the proceeding against the party so arrested belongs to the ordinary procedure. And not only justices of the Peace and the Secretary of State may issue a warrant to arrest the publisher of a blasphemous or seditious libel, but a judge of the High Court of Justice may also do so whenever an information has been filed against an individual for such offence.¹

Remedy by ex officio information of Attorney-General for sedition.—While at most a Secretary of State can only arrest and commit for trial one charged with a seditious or blasphemous libel, and while there is no means of summarily arresting seditious and blasphemous persons until a charge has been duly made and entertained by justices, or an indictment has been found, there is one rapid and exceptional mode of proceeding often adopted. And it is now at least a remedy almost peculiar to seditious and blasphemous libels, so that it may properly be noticed here, leaving other modes of procedure to be stated at a later page as applicable to all libels generally. This exceptional and expeditious mode is a criminal information filed *ex officio* by the Attorney-General, or in his absence by the Solicitor-General. So great a power vested in any officer of the Crown has been denounced again and again as dangerous to liberty, and sometimes abused, or at least likely to be so for unworthy purposes. But the rule has long been recognised, that an Attorney-General can always of his own mere motion file a criminal information for any misdemeanour, libel included, without notice and without the leave of any court or any functionary; and this he may do at any moment.² In a report of a Committee of

of State. He is by this means empowered, in the first instance, to pronounce the paper to be a seditious libel, a matter of such difficulty, that some have pretended it is too high to be intrusted to a special jury of the first rank and condition. He is to understand and decide by himself the meaning of every inuendo. He is to determine the tendency thereof and brand it with his own epithets. He is to adjudge the party guilty, and make him author or publisher as he sees good; and, lastly, he is to give sentence by committing the party. All these authorities are given to one single magistrate, unassisted by counsel, evidence, or jury, in a case where the law says no action will lie against him, because he acts in the capacity of a judge.”—*R. v Wilkes*, 19 *St. Tr.* 997.

¹ 48 Geo. III. c. 58. ² *Prynne's Case*, 5 Mod. 459; *Show.* 106.

the House of Commons it was stated, that the records of such informations were traced to Edward I., and that they were very frequent in the time of Henry VII. and Henry VIII.; but another account traced them no higher than Henry VII., when Empson and Dudley were at work, and that they originated in a statute which gave power to courts of Assize to inquire without grand juries, and which was soon afterwards repealed.¹ In short Holt, C. J., said they were part of the common law.² All agree, that this information *ex officio* was brought into prominence by the Star Chamber, and when that court was abolished, this proceeding was not abolished also, being at that time overlooked. Hale, C. J., thought it an illegal practice. And in 1688 the House of Commons resolved, that informations in the King's Bench should be taken away, except leave of the court was first obtained. But an express clause in the Bill of Rights to that effect was objected to by the House of Lords, and so the matter was left untouched.³ Subsequent attempts have occasionally been made to put an end to these informations, but without effect.⁴ The whole process was complained of at

¹ 3 Hen. VII. c. 1; 11 Hen. VII. c. 3; 2 Inst. 51. See R. v Earberry, 20 St. Tr. 861.

² Prynne's Case, 5 Mod. 459. The practice of the Attorney-General issuing these informations was traced by some to the Star Chamber, and it first became conspicuous in the early part of Charles I.; and its use in support of the prerogative was said to have largely contributed to the general resentment of the nation and the end of that king.—16 *Parl. Hist.* 45.

³ 13 St. Tr. 1370.

⁴ 16 *Parl. Hist.* 45, 1175; 23 *Parl. Deb.* 1070. It is thought the real author of *ex officio* informations was Augustus, who watched the defamatory libels which were issued by Cassius Severus under feigned names.—*Suet. Aug.* And Tiberius was equally vigilant in the same matter.—*Suet. Tib.*

"I am fully convinced, that were it not for such writings as have been prosecuted by Attorney-Generals for libels, we should never have had a Revolution nor his present Majesty a regal crown. Nor should we now enjoy a Protestant religion or one jot of civil liberty. Kings can hardly receive any intelligence but what their ministers give them; and these gentlemen, being guided by avarice and ambition, endeavour to represent every man who strives to get them dismissed from their employs, as one who is about to attack the throne itself, call him traitor directly, and then exert the power of the Crown to demolish him. The use of the word treasonable is generally to give them a pretence for disregarding the common rules

great length by Horne Tooke as a grievous wrong.¹ And so unfair has it appeared that some judges in modern times have refused to allow one of its privileges, that of reply, when the Attorney-General or Solicitor-General does not conduct the prosecution himself, but delegates the office to another counsel.²

Procedure in the ex officio information.—This right is vested in the Attorney-General or in the Solicitor-General as an officer and servant of the Crown; and he must exercise it on his own responsibility. Lord Mansfield more than once refused to allow him to apply to the King's Bench Division for the sanction of the court, so as thereby to devolve the duty and responsibility on the court instead of taking it upon himself.³ If however the Attorney-General hesitates, he may summon the defendant to show cause why the information should not issue.⁴ The Attorney-General may also demand a trial at bar instead of before a single judge⁵; and he has the privilege of a reply though the defendant call no witnesses.⁶ The Attorney-General has also the benefit of a special jury, and this has sometimes been complained of when any humble individual has been the defendant, though this

of justice."—*Letter on Libels* (1764) 49. "It must, and it ever would be the bias of men, entrusted with power, to confound successful but lawful opposition with treasonable resistance, and a powerful exposure of the follies or wickedness of ministers and men in power with seditious libels and calumny. The ingenuity of man could not devise a system of law, where in cases of this nature he would not say the prejudice, but the inclination of those who were to execute the laws was not generally to convict men accused of having transgressed them; and in libel it should further be observed, that, contrary to all other crimes, that which approached the confines of guilt was not only innocent, but meritorious and useful."—*L. Holland, H. L.* (1811), 19 *Parl. Deb.* 134.

¹ 20 *St. Tr.* 660. The bare putting in force of this power may subject a defendant to an expense varying from 60*l.* to 200*l.* without any hope of indemnity. It is, as was said, a species of arbitrary fine hanging over every writer, publisher, editor, printer, and seller of a libellous writing.—19 *Parl. Deb.* 143; 23 *Parl. Deb.* 1081.

² *R. v Toakley*, 10 *Cox, C. C.* 406; *R. v Barrow*, 10 *Cox, C. C.* 407; *R. v Christie*, 1 *F. & F.* 75, 535. ³ *R. v Phillips*, 3 *Burr.*

1565; 4 *Burr.* 2090; *R. v Wilkes*, 4 *Burr.* 2577; 4 *Burr.* 2090; *Wilkes v R.*, 4 *Bro. P. C.* 360; *Wilmot*, *Op.* 322. ⁴ *Ibid.*

⁵ *R. v Johnson*, 1 *Str.* 644.

⁶ *R. v Horne*, 20 *St. Tr.* 660; *Cowp.* 672.

can seldom be done with justice, seeing that libel is not the offence of the illiterate. Besides a special jury was said to be not peculiar to civil or criminal proceedings,¹ and the official who had charge of the special jury was as independent of the Crown as the judge could be. One grievous abuse long complained of was, that when the information was filed there was no means of compelling the prosecution to be promptly followed up.² At last however, by a statute of 1819, if the trial be not brought on by the prosecutor within twelve months the defendant is allowed to bring it on himself³; and the same statute compels the prosecutor to give a copy of the information to the defendant.⁴

Policy of ex officio informations.—The policy of this mode of prosecuting libels has had its opponents and defenders, though it is now in point of practice confined to seditious and blasphemous libels. It has been often complained of in Parliament as in its secrecy and swiftness and overwhelming force too nearly akin to despotism, and somewhat out of harmony with a land of liberty, where prosecutions are subject to fixed and well understood laws, and where a man can defend himself against all antagonists on equal terms.⁵ On the other hand it has been urged, that the press often acts like an assassin, and must be coped with by weapons which may be nearly as suddenly and energetically used; and that this cannot be done except by confiding a discretion to one, who is bound over to prudence and moderation by all the circumstances of his office, and is too well watched to be likely to abuse it. And it is added that though the power has been used since the time of Edward III., no great abuses have been discovered in it. Like the sword of Goliath, it is reserved for great occasions.⁶ And

¹ Att.-Gen. 34 Parl. Deb. 314; Ersk. Speeches, *R. v Perry*, 22 St. Tr. 953.

² The JUDGES however said, in 1770, that if the Attorney-General unduly delayed to bring the defendant to trial, the court had power to order a trial.—*R. v Almon*, 20 St. Tr. 856. ³ 60 Geo. III. & 1 Geo. IV. c. 4, § 9. ⁴ *Ibid.* § 8. ⁵ 16 Parl. Hist. 1127.

⁶ BURKE, indeed, urged, that so dangerous a power should be cut off from the Constitution as a rotten limb, and that it had only escaped the notice of our forefathers in the hurry and precipitation of the Revolution.—16 *Parl. Hist.* 1152. As WEDDERBURN urged: “When reason and sound principles dictate reformation, must we be

what now makes less important the existence of any weapon so secret and deadly in the hands of Government, is the knowledge, that while there is no censorship and no registry of printing presses or of newspapers, while education prepares its millions of readers and writers, a champion will never fail to come forth on any great emergency. Even in the midst of legions of spies and informers a hand will issue from the crowd and write on the wall in letters of fire immortal slanders—a hand without a name, which cannot be traced, but will leave many things well spoken and wholesome to be remembered in all future time.¹

Punishment for seditious libel.—The punishment for seditious libel did not differ from the punishment as to blasphemous and immoral libels. The pillory was often selected as peculiarly appropriate, as well as ordering the defendant to appear at the assizes with a paper denoting his offence. This was done in 1699 in a case at Exeter.² In another case he was ordered to go into all the courts of Westminster with this paper in his hat, and it is said that in Chancery he behaved himself insolently, so that the court increased his punishment by imprisonment.³ Sometimes whipping was added.⁴ The pillory was abolished in

deterred by mere names? What might have been proper 400 years ago may be now quite absurd and pernicious.”—16 *Parl. Hist.* 1148. But LORD NORTH defended the power as a wholesome terror to restrain the virulence of the press. Speaking in the age of Wilkes, he said: “Our eyes open on libels; our eyes close upon libels. In short, libels, lampoons, and satires constitute all the writing, printing, and reading of our time.”—16 *Parl. Hist.* 1166.

¹ *Re Junius*, ante p. 90. An ex-Att. Gen. has said: “In considering whether a criminal information should be issued, the Att.-Gen. has to consider various matters. The public jealousy is vigilant in all that concerns the freedom of the press. Juries have learned the secret of covering with their indulgence nearly every kind of expression of opinion honestly put forward. What injury recoils on a Government when defeated by an acquittal, or even if not defeated, by the risk of forcing into notice and enhancing the importance of mock martyrs! The injustice of punishing one who may be a mere instrument of publication, and ignorant of the evil he creates, while the real author or practised libeller may contrive still to write with more than bitterness without risk of legal visitation!”—1 *Lord Denman, Mem.* 370.

— LORD MANSFIELD said a court prosecution should never be instituted without certainty of success.—1 *Butler's Rem.* 125.

² *R. v Beare*, 12 Mod. 221; L. Raym. 418. ³ *R. v Fitzgerald* (1702), Salk. 401; *R. v Bedford*, Holt. Lib. 107. ⁴ *R. v Walker*, 2 Geo. II., Holt, Lib. 108.

1837,¹ and whipping for this offence has long been abolished also.² The punishment at common law consists of fine or imprisonment or both, to which may be added surety of the peace.³ And these last are the only punishments now left. And if there are several libels, a series of terms of imprisonment may be added one to the other.⁴

¹ 1 Vic. c. 23; 2 Pat. Com. (Pers.) 282.

² 2 Pat. Com. (Pers.) 271. Leighton, in 1630, was fined, imprisoned, whipped, pilloried, slit in the nose, branded in the face, and lopt of his ears.—3 *St. Tr.* 387. Prynne was punished with several of the same pains.—3 *St. Tr.* 575. And Bastrick had the like punishment for a libel against the hierarchy.—3 *St. Tr.* 711. And Dangerfield was, in addition, whipped from Aldgate to Newgate, and Newgate to Tyburn.—11 *St. Tr.* 503. And a woman was also fined and pilloried in 1680.—*R. v Cellier, Dig. L. Lib.* 117.

³ *R. v Dunn*, 12 Q. B. 1062.

⁴ *Gregory v R.* 15 Q. B. 974. See further as to punishment generally for libel, *post*.

CHAPTER VI.

LIBELS ON PARLIAMENT AND RIGHT TO PUBLISH
PARLIAMENTARY DEBATES.

Peculiarity of libels on Parliament.—Of all the subjects on which the tongue and pen of free citizens can be engaged, none is to be compared to the powers and duties of the legislature. Parliament is at once the centre of all those threads of discussion—the mainspring of all that complicated machinery, which reduces speculation, argument, and remonstrance into practice. Whatever can be done to influence Parliament is the first step in all practical reforms. Whoever can advocate, advise, warn, or entreat, looks to this as the great sum of his efforts. Hence the points of contact and collision are as numerous as the variety of topics which are always in course of discussion. While there is the same freedom in public speakers and writers to comment on the work and conduct of Parliament, and all its members, as on all other parts of the Constitution, there is this striking difference, that Parliament can redress its own wrongs, avenge its own insults, and dictate the bounds beyond which its critics must be content to be silent. Each and every member of Parliament has duties to perform, and duties which are expected, and the tongue of slander may be too free with his reputation, and thwart his best efforts. It is therefore one of the chief heads of this chapter on Sedition to trace out how far the free handling of critics and commentators can go in interfering with the labours, the dignity, and reputation of that great power in the state, which has done so much and has still constant arrears of work to overtake. To watch or predict the course, to advance the intelligence, and promote the objects of Parliament engross a large

share of every citizen's daily life, and he cannot choose to shut his eyes to the sequel of all these hopes and fears. How far and on what occasions he is likely to provoke the indignation of Parliament, and at what cost, ought now to be set forth.

The privilege of Parliament.—The privilege of Parliament, by which is meant the exclusive right of either House to decide for itself on each occasion what is or is not an interference with its own independence, dignity, and duties, and with those of each of its members, is so obvious an accompaniment of its exalted position in the economy of government, that if it had not existed by a long course of usage it would have required to be invented. The function of legislation being the highest exercise of reason and power known to mankind, it would have been a degradation to be obliged to resort to any other court in order to vindicate each obstruction of that function. And though courts of law, when in their highest state of efficiency, are able satisfactorily to administer justice between man and man in all other respects, yet their whole practice and principles are based on a fixed and certain order of things, and definite rules foreordained for their guidance, and which they have no power to change, however inadequate and defective as a means of highest justice. This necessarily implies, that there must be some other tribunal and some other source of power which can adapt its processes to a higher standard of justice, and can emancipate itself from technicalities which are inevitable in all ordinary courts, and which are felt even by judges themselves to be impediments, and often a cause of humiliation on that very account. Where wisdom is allied to power, and that power, at least in the case of the House of Commons, is so great, that it can safely withstand all other powers known to the Constitution, there is no reason why it should not execute the office of self-vindication.¹ And this is the more necessary, seeing that it is entirely identified at all times with the community, for whose benefit it exists and in which it constantly lives and moves. Its very constitution, its means of knowledge, its intimate

¹ "The House of Commons, by reason of its power to refuse mutiny bills and supplies, is a power in the Constitution, which no other body could resist."—*Lord J. Russell, H. C., 151 Parl. Deb. (3) 1380.*

contact with the average intelligence of the nation in all its varied interests—the number of its members, who themselves are part of the general public, selected from a wide constituency, is such, that all the safeguards against usual error are here concentrated.¹ A body so composed can with difficulty go wrong, or at least for any great length of time, and if it does so, the same may be said of all other bodies and all courts, which have fewer members and less abundance of counsellors. The privilege of Parliament is a prominent and settled part of the Constitution, and it is brought to bear with irresistible effect at all times where these high functions are impeded by third parties.

Privilege has usually been conceded to be essential to the supreme branch of the legislature—the 'grand inquest of the nation (as Coke called it), which has to defend itself against the encroachments of the Crown on the one hand and the injudicious or ill-intentioned attacks of individuals on the other hand.² Burke said, "People remain quiet, they sleep secure, when they imagine that the vigilant eye of a censorial magistrate watches over all the proceedings of judicature, and that the sacred fire of an eternal constitutional jealousy, which is the guardian of liberty, law, and justice, is alive night and day, and burning in the House of Commons."³

Jurisdiction of Parliament and courts of law contrasted.—While it is said that Parliament is the exclusive judge of its own privileges, or rather of the limits of its own jurisdiction, it is not meant, as is sometimes supposed, that it claims to be omnipotent, and can at will arrogate to itself the whole powers of courts of justice and a great deal more. On the contrary, courts of justice have precisely the same difficulties as Parliament in determining the bounds of their power and authority, and this is always the most delicate of the subjects that can engage their

¹ "The greatest security a people can have for their liberty is when the legislative power is in the hands of persons so happily distinguished, that by providing for the particular interests of their several ranks they are providing for the whole body of the people, or, in other words, where there is no part of the people that has not a common interest with at least one part of the legislators."—*Addison, Spect.* No. 287.

² 16 Parl. Deb. 502; 38 Parl. Deb. (3) 1270.

³ 17 Parl. Hist. 49.

attention, and the latest chapter of the law that can be comprehended aright. What is meant is, that Parliament has the same power to determine for itself what it can or cannot do—what is and what is not its proper business—as the High Court of Justice itself, and each is indeed the sole exclusive judge on that point. Each is credited by the Constitution with sufficient intelligence, zeal, conscientiousness, and self-restraint to know what it is called upon and expected to do—how far to advance in any given direction, and when to stop; and no other power known to the Constitution can question their respective decisions. To say, that Parliament would ever be so foolish or ignorant as to undertake to recover debts or decide questions of title to land or goods is no greater and no less than to say, that the High Court of Justice will be so lost to reason as to substitute for a statute or an axiom of common law as its rule of conduct some other new and unheard of rule of its own devising.¹ Each power has of necessity a wisdom of its own inherent in it, which operates like an infallible instinct.² But the general work of Parliament lies altogether away from the general work of courts of law. The latter have, or are assumed to have, certain pre-ordained rules to guide them, and of which they are always vigilant and tenacious, while the former is incessantly occupied in amending the defects and oversights which are to be found in the best

¹ "The House of Commons is a part of the High Court of Parliament, which is, without question, not merely a superior, but the supreme court in this country, and higher than the ordinary courts of law." (*Lord Camden, Entinck v Carrington*, 19 *St. Tr.* 1047.) "And if we give credit to the courts of common law, that they will not issue writs of attachment except in due course, and in accordance with the powers which the law gives them, and that notwithstanding the possible abuse of the liberty of the subject, to which this principle may give rise, by enabling a court to imprison for any cause, why should we not equally give credit to both branches of the High Court of Parliament, that they also will duly execute their powers in obedience to the law from which they derive them, and to which, in common with all other courts, they are subject, though this course may also possibly lead to the same consequences—the abuse of the liberty of the subject by their imprisoning any one at their mere will and pleasure? The possibility of abuse, which is urged as an objection to the power of either House to issue its mandate in such a form, is no valid argument against its existence." —*Howard v Gossett*, 10 *Q. B.* 457.

² *Per De Grey, C. J., re Crosby*, 3 *Wils.* 202.

of those very rules. Parliament collects all kinds of evidence and knowledge useful to guide it in this elevated research. And no human employment can rank higher, for it assumes, that a definite law already has been tried and been found by the highest available wisdom to be wanting. The pursuit of a higher and still higher standard of laws than any yet found is the beginning and end of the vocation of Parliament—the most transcendent work of human intelligence and power. And yet in the exercise of their respective functions a court of law sometimes, as will shortly be seen, comes in conflict with Parliament, each in course of its proper business being, to a certain extent, seised naturally and legitimately of a particular subject matter, yet where it is impossible for each to have its way. These occasions are few and far between, but when they do occur it is absolutely necessary for one of the two to dispose exclusively of the subject. Both having equal wisdom, the test of precedence must depend entirely on which of them has the greater power allied to this equal wisdom, and Parliament, being acknowledged to be irresistible in its command of resources, is confessed, on that account alone, to hold the key of the situation.

Early instances of Parliament exercising its privileges.—That there was some special law corresponding to what is now known as privilege of Parliament, was recognised at least as early as the reign of Richard II.¹ and a series of precedents since that time.² At first confused ideas of the connection of one thing with another pervaded the practice of Parliament, as they pervaded courts of justice sometimes for like reasons. Thus no one can now see, that any breach of privilege need be committed by a trespasser who took some ore from the mine of one of the members,³ or who broke his fences,⁴ or who poached his rabbits;⁵ and yet these acts, which the ordinary courts could satisfactorily punish, and which involved no reasonably close interference with the discharge of a member's duties, were punished as breaches of privilege.⁶ The occasions in which any conflict arises between Parliament and

¹ 11 Rich. II., 3 Rot. Parl. 244 ; 32 Hen. VI., 5 Rot. Parl. 239.

² Thompson's Case, 8 St. Tr. 50. ³ Grosvenor's Case, 2 Ap. 1733.

⁴ Lord Barrymore's Case, 19 Jan. 1840. ⁵ Admiral Griffin's Case, 16 Mar. 1759. ⁶ 51 Parl. Deb. (3) 97.

courts of law will, however, be found more conveniently noticed on a subsequent page under the head of excusable libels—namely, where publications issued by the House are protected against all comers—though the courts were once disinclined to allow such protection.¹ It is enough to say, that the commitment by the House of Commons on the Speaker's warrant is deemed conclusive evidence in every court of law, that the commitment is legal, if it merely state that it is for a breach of the privileges of the House without any further details.² And it follows that its officers, who execute the warrant of commitment, are also free from punishment or liability.³ It is enough here to say, that it is no business of courts of law to inquire, whether the contempt or breach of privilege on which Parliament acts was really committed.⁴ And when a person so committed seeks at the hands of the court a release by *habeas corpus*, the courts can give no redress.⁵

The power of committal for breach of privilege.—A statute of 4 Henry VIII. c. 8, enacted, that all accusations, executions, fines, and punishments, and condemnations of members of Parliament should be utterly void. It is, however, unnecessary here to advert to all the privileges, as that which protects them from the abuses of free speech and thought in others is alone in question. The above statute was, it is true, said by Hale to be merely declaratory of the common law.⁶ This peculiar power,

¹ See *post*, chap. ix. ² *Burdett v Abbot*, 14 East, 1. ³ *Burdett v Colman*, 14 East, 163; *Howard v Gossett*, 10 Q. B. 359. ⁴ *Stockdale v Hansard*, 9 A. & E. 169, 195; *Beaumont v Barret*, 1 Moore, P. C. 76.

⁵ See 2 Pat. Com. (Pers.) 251. When a person was committed by Parliament for contempt of court, it was long frequently attempted to obtain his release by *habeas corpus* on application to a court of law, some illegality being put forward as a ground. LORD KENYON said, in 1799, that such attempts had been made every seven or eight years for the half century preceding that date. In a case of that kind, where the House of Lords had committed and fined a country editor, his release on *habeas corpus* was urged on three grounds:—1. That the House of Lords had no power of imprisoning beyond the duration of the session, which the House of Commons clearly had not. 2. That the House of Lords had no power to impose a fine. 3. That it had no power to commit for a contempt committed out of the House. But all these points were overruled.—*Re Flower*, 27 St. Tr. 986.

⁶ Hale's Juris. Parl. He said that it is "the *lex et consuetudo*

therefore, which is incident to the House of Commons, of punishing for contempt, though the House has no ordinary judicial powers, is said to rest on no other basis than the *lex et consuetudo Parliamenti*, which is as much part of the Constitution as any of the powers and privileges of the highest courts of justice.¹ Thus if a serjeant of the House were sued for excess in executing its warrant, his conduct would be decided according to the law of Parliament and not according to common law rules.² The power of the House of Commons is not, however, exercised with respect to libels on the Government generally, or on the state, but is confined to libels upon itself and its members.³ And yet, like ordinary courts of justice, its jurisdiction in early times sometimes extended beyond the just limits now settled. The first instance of a member being expelled from the House of Commons for libelling another member is said to have been that of Arthur Hall, in 1581, who was also fined and imprisoned as part of the same punishment.⁴ This right of the House of Commons to commit strangers for contempt of Parliament or for breach of privilege, —which is usually in the form of libel on the House or a member—was exercised in the time of Charles I.⁵ The House also asserted the right in the case of the Kentish Petition.⁶ Between 1701 and 1774 there were thirty instances of such commitments.⁷ In the cases of Oliver and Crosby in 1771, two courts of common law recognised

parliamenti that all weighty matters arising in Parliament concerning the Peers or Commons in Parliament should be discussed, determined, and adjudged by the Court of Parliament, and not by any other law used in any inferior court. Moreover, the king cannot take notice of anything said or done in the House of Commons but by report of the House of Commons; and every member in Parliament has a judicial place, and can be no witness. Every offence committed in any court, punishable by that court, must be punished in the same court or in some higher, and the Court of Parliament has no higher.” —*Ibid.*

¹ *Kielley v Carson*, 4 Moore, P. C. 63; *Fenton v Hampton*, 11 Moore, P. C. 347; *Dill v Murphy*, 1 Moore, P. C., N. S. 487.
² *Wilde, Serjt.* H. C. 1843, 67 Parl. Deb. (3) 40. ³ 16 Parl. Deb. 500.

⁴ *D'Ewes*, 291; *Hatsell*, 93; 1 Com. J. 125; *Hall. Const. H.* c. 5. In 1680 the House of Commons ordered a clergyman to be impeached for a seditious sermon, and all the precedents as to the power of the House to commit were then collected.—*See* 8 *St. Tr.* 1.

⁵ 4 *Inst.* 23. ⁶ *See ante*, p. 35. ⁷ 16 Parl. Deb. 291.

this right.¹ And in the case of Flower, who was in 1799 committed by the House of Lords, the court acted in like manner.² It has been said that, as the law of Parliament was only known to Parliament men, the public could not justly be answerable for any breach of it; but the same may be said of courts of law, as the court itself pointed out.³

Instances of libellous comments being breaches of privilege.—The instances in which the House has exercised the power of committing those who libel it have varied with the circumstances of the time, and no certain result has followed when a jury intervened. When the *Oracle* published, that “party rancour had deprived the king and country of the great abilities of Lord Melville, that he had fallen a victim to confidence misplaced and to prejudice misjudged, and had been condemned without a trial;” this was held by Parliament to be libellous.⁴ Owen, on the other hand, was charged with vilifying the House of Commons by calling their conduct as to Alexander Murray “violent, oppressive, and wanton,” and comparing the House to a Turkish Divan and to the Inquisition; but the defendant, being tried by a jury, was found not guilty.⁵ The *Morning Chronicle* said, in 1798, that “some lords had determined to vindicate their importance by regulating the dresses of our opera dancers, and that one of the Roman Emperors recommended his senate, when they were good for nothing else, to discuss what was the best sauce for a turbot.” The House resolved, that this was a scandalous libel, and ordered the proprietor and editor to be committed for three months unless they paid each a fine of 50*l*.⁶ An editor wrote of a bishop, in 1799, that “for some time the bishop was an opposer of Mr. Pitt, but suddenly finding that was not the way to preferment, he suddenly became an alarmist, then applied to Mr. Pitt for further preferment, and had since supported his measures. But that the minister

¹ *Re Crosby*, 3 Wils. 188. ² *R. v Flower*, 8 T. R. 314. ³ *Per De Grey*, C. J., 3 Wils. 200, and see *ante*, p. 108. ⁴ 4 Parl. Deb. 382. ⁵ *R. v Owen*, 18 St. Tr. 1203.

⁶ A.D. 1798, 33 Parl. Hist. 1312; 27 St. Tr. 1070. Again, in 1804, Cobbett was found by a jury guilty of a libel for, amongst other things, calling Lord Hardwicke a sheep farmer, and Lord Redesdale a stout built special pleader.—*R. v Cobbett*, 29 St. Tr. 54. See *ante*, p. 94.

had not yet thought the right reverend time-server and apostate worth paying." The House held this was a scandalous libel on the Bishop of Llandaff, and imprisoned the libeller for six months and fined him 100*l*.¹ In 1810 Sir F. Burdett delivered a speech in the House of Commons, in which he denied its power to imprison strangers for contempt in this way, and urged that the only remedy was an action or indictment. And he published an enlarged edition of his speech for the benefit of his constituents, which was in its turn complained of as a contempt, and he was committed.² In later times it was sometimes said of this case, that the House was not well advised as to the right mode of acting, and was involved in difficulties, owing to an action brought by Sir F. Burdett against officers of the House on the occasion.³ In 1819 Mr. Hobhouse was on similar grounds committed to Newgate,⁴ while D. O'Connell was at a later date reprimanded in his place by the Speaker.⁵

The publisher of the *Times* in 1831 was committed for calling Lord Limerick "a thing with human pretensions, who treated the Irish poor with brutal ridicule or impious scorn."⁶ And a libel on the Lord Chancellor, in the course

¹ *Re Flower*, 27 St. Tr. 986.

² 65 Com. J. 252. SIR S. ROMILLY said: "Any man has a right to discuss every great constitutional question, whether of original power or of constituted authority. He might show his folly in arguing a point in which no other man would agree with him, but still he had a right to do so. There might be inflammatory language in the paper in question, but at the same time it was reasoned with great ability, and all the great authorities and precedents on the subject were given and argued upon with much learning. This was a grave argument, and God forbid that any man should be precluded from discussing such a subject."—16 *Parl. Deb.* 282. The House, however (by a majority of 271 to 80), held that the mode and tenor of Sir F. Burdett's speech was to advocate resistance by force, to impute corrupt practices to most of the members—that the House had encroached on the liberties of the people and enormously abused its powers, and set itself up above both king and people. And Sir F. Burdett was committed to the Tower, though influential members thought a reprimand sufficient. Sir F. Burdett afterwards brought an action against the Speaker.—*Burdett v Abbott*, 14 *East*, 1.

³ Rolfe, S. G. 51 *Parl. Deb.* (3d) 1138.

⁴ 75 Com. J. 57.

⁵ 93 Com. J. 207, 312, 316.

⁶ 3 *Parl. Deb.* (3) 1751. In 1832 a solicitor having published a letter reflecting on members for their vote in a committee on a private bill, was summoned to the bar and admonished by the

of his duties in deciding appeals from courts of law, is treated as breach of privilege, as was the case when the *Morning Post*, in 1854, wrote a libellous article against Lord Brougham.¹

Other modes of punishing a breach of privilege.—

But while Parliament has thus the means of punishing a breach of privilege by an order of committal, sometimes to the custody of the Black Rod, and sometimes to Newgate, or the Tower, it does not always exercise this right, and is content to devolve the adjudication and the punishment on the ordinary courts of law. Either House of Parliament, instead of punishing the party itself, may pray the crown to direct the Attorney-General to prosecute by indictment or criminal information. When this is done, however, so great is the power of juries, that they have the uncontrollable right of acquitting the defendant, and sometimes in sympathy take this course, as was done in the case of Bushell the Quaker, the Seven Bishops, Owen, and Reeves, Woodfall, Stockdale, Dean of St. Asaph, and other cases.² The House had often on such occasions been urged not to allow itself to be trampled on and go begging to courts of law for protection, seeing that its privileges are part of the Constitution; but to commit the parties by its own authority.³ Burke said, that after Stockdale's case he never would again consent to the House of Commons ordering the Attorney-General to prosecute for libel. The House should not delegate that power to any court whatever.⁴ In Reeves' case, Fox strongly advised the House

Speaker.—87 *Com. J.* 278, 294. While an editor was committed to custody for imputing corrupt motives to a chairman of a committee on a private bill.—113 *Com. J.* 189, 192, 203.

¹ 66 *Lords J.* 704, 737, 743, 764.

² *R. v Owen*, 18 *St. Tr.* 1203; *R. v Stockdale*, 22 *St. Tr.* 291; *R. v Reeves*, 26 *St. Tr.* 530. In such cases it has been urged by a Peer, that whenever a libel is published on a peer and can be tried equally well in the inferior courts this course ought to be taken, because the process of attachment for contempt involved peculiar hardship, and was a violation of the most general maxims of English law. The party was not tried by his peers, the guilt of the libel was previously declared, witnesses were examined in his absence, the court was a close court, and, above all, the House was accuser, judge, jury, and the injured party. But the House disregarded these remonstrances.—*L. Holland, re Flower*, 27 *St. Tr.* 1015.

³ 16 *Parl. Deb.* 491.

⁴ 30 *Parl. Hist.* 986.

not to order a prosecution, but to take the punishment into its own hands; but the House ordered a prosecution, and Reeves was acquitted.¹

Publishing of Parliamentary debates at first treated as breach of privilege.—The freedom of speech allowable in the interior of Parliament, how far each member can speak his mind on any subject, relevant or irrelevant, with entire immunity either from his fellow members on the one hand or the people and the Crown outside on the other hand, belongs properly to that division of the law entitled “the Legislature.” What can be done to a member for any abuse of this freedom of speech, and what restrictions if any can be put upon him, must therefore be noticed in another place, and only a small part of it belongs to that chapter of the law of libel, which treats of excuses arising from privilege of Parliament. But at present it is necessary to see how far freedom of speech and comment is allowed to those of the public outside, who choose to look into this interior. Such a right of comment is a vital part of the liberty of the subject, and no people can be deemed free, who cannot discuss anything and everything that is done by their representatives as well as by their hereditary legislators in the great council room, provided such discussion is conducted with average decorum.² However conspicuously the parliament is now identified with the fortunes of the press, it for a long time looked askance on this publicity, and even affected open hostility. While each House admitted strangers as a matter of courtesy, it was averse to sanctioning any stranger committing to writing notes of its proceedings and publishing these for the information of the public. There was thus for a long time an imperfect appreciation of the reciprocal relations existing between Parliament and the public.

It has long been a general resolution of the House of

¹ 32 Parl. Hist. 650, 681.

² “The publicity given in modern times to what passes in Parliament is essential to the maintenance of the relations subsisting between the Government, the legislature, and the country at large. Every member of the educated portion of the community, from the highest to the lowest, looks with eager interest to the debates of either House, and considers it a part of the duty of the public journals to furnish an account of what passes there.”—*Per Cockburn, C. J., Wason v Walter, L. R. 4 Q. B. 90.*

Commons, that whoever publishes or writes anything reflecting on a member and misrepresents his proceedings in Parliament commits a breach of privilege.¹ And it is the same in reference to any report of the impeachments or prosecutions in which the House is engaged.² So late as Lord Melville's impeachment, the House directed one person only to publish a report.³ The policy which led both Houses of Parliament to make this order against publication of their debates has been vindicated on the ground, that the Crown used to attempt to punish members for free speaking, or sought to prevent them altogether speaking by an immediate dissolution.⁴ And it is said the first committal of a printer of debates for a distinct contempt on that ground was in 1694.⁵ And even so late as 1728 the House of Commons laid down the wide proposition by way of resolution, "That it is an indignity to and a breach of privilege for any person to presume to give in a written or printed newspaper any account of the debates or other proceedings of the House or of any committee thereof; and on discovery of the authors, printers, or publishers of any such written or printed newspaper, this House will proceed against the offenders with the utmost severity."⁶

In 1738 a solemn debate began by a suggestion of the Speaker, that he saw a practice prevailing, which a little reflected on the dignity of the House; he meant the inserting an account of their proceedings in the printed newspapers, by which means these proceedings were liable to very great misrepresentation.⁷ One speaker urged, that, if the speeches of the House were every day printed, "they should be looked upon as the most contemptible assembly on the

¹ 1642, H. C. 2 Com. J. 220; 27 Feb. 1698, H. L.; A.D. 1699, 12 Com. J. 661; A.D. 1701, 13 Com. J. 767.

² 45 Com. J. 508.

³ 6 Camp. L. Chs. 575.

⁴ Lord Campbell, H. L. 149 Parl. Deb. (3) 953. "The secrecy of Parliamentary debates—a secrecy which would now be thought a grievance more intolerable than ship money or the Star Chamber, was at the time of the Revolution inseparably associated even in the most honest and intelligent minds with constitutional freedom. Those precautions which had been originally devised for the purpose of protecting patriots against the displeasure of the court, now served only to protect sycophants against the displeasure of the nation."—*Macaulay, Hist.* c. 19.

⁵ A.D. 27 Dec. 1694.

⁶ 21 Com. J. 238.

⁷ 10 Parl. H. 801.

face of the earth." It was said "Parliament, when they did amiss, would be talked of with the same freedom as any other set of men whatsoever." Sir Robert Walpole complained, that he had read professed debates of the House, wherein all the wit, the learning, and the argument had been thrown into one side, and on the other nothing but what was low, mean, and ridiculous; and yet when it came to the question, the division had gone against the side which upon the face of the debate had reason and justice to support it.¹ Each speaker assumed, that the practice must be stopped, but all were unconscious, that the time was coming, when it would be impossible to do so. And the House relieved its misgivings by resolving, "that it is a high indignity to and a notorious breach of the privileges of the House for the printer of any newspaper to presume to give any account of the proceedings of the House as well during the recess as the sitting of Parliament."²

Newspaper reports of debates now permitted by Parliament.—By degrees newspaper reports of Parliamentary debates became more and more frequent and less and less odious to the members of the legislature, though no express leave has yet been given, nor even the order yet been cancelled which treats these as contempts. The reason usually given, why Parliament has refused to embody in some statute this right³ of all men to publish

¹ 10 Parl. Hist. 285.

² 10 Parl. Hist. 812. To such shifts were reporters reduced for veracious materials, that DR. JOHNSON said he had composed the famous report of a speech of Pitt in answer to Horace Walpole in a garret near the Strand; and in his Parliamentary reports generally he took care, that the Whig dogs should not have the best of it in the arguments.—*Boswell's Johnson; Hawkins' Johnson.* And LORD KENYON said (temp. 1778) Johnson had composed the famous speech of L. Chesterfield against the Dramatic Licensing Act.—See *post*, chap. xi. When the votes were first printed a formal motion for leave was moved for every day.

³ A faithful report, published in a newspaper or by any volunteer, of a debate in either House of Parliament, though it contain matter which is *per se* libellous to an individual who is mentioned therein, is a right which belongs to the public; and the individual so libelled has no remedy against the publisher or any other person. The reason is, that all the public have an equal interest in the subjects debated in Parliament by the representatives of the nation, and such interest could not be made real and effectual unless the right

reports of Parliamentary proceedings is, that in practice Parliament has ceased to punish these publications as breaches of privilege.¹ But a better reason is, that the extreme remedy is, like some other remedies of the Constitution, kept in hand, solely to meet some rare emergency which may or may never arise; yet, should it ever arise, no other remedy will be equally effective. No practical evil has flowed from the freedom allowed to reporters and publishers in this respect. Since the regular publication of the debates has been encouraged, the chief complaint on the part of members of each House of Parliament at first was occasional unfairness or rather one-sidedness, either by giving a misleading abstract or entirely omitting speeches; but even this cause of complaint has ceased, for the press is many-sided, and it can seldom be prudent in any one journal to do otherwise than aim at correctness and completeness.² Moreover, though a standing order is maintained, which in terms prohibits strangers from publishing the debates, this can practically do no injury, because it is at most a remedy and a restriction which can only be enforced by Parliament itself. It is not open to informers or any member of the public. Being under the exclusive control of the legislature, it would require the collective wisdom of Parliament to be combined, in order to crush any individual offender. And this cannot be reasonably anticipated and need no longer be dreaded, since all the habits of life, all the instincts of an intelligent and self-governing community conspire to make the familiar knowledge of Parliamentary proceedings free as the air we breathe.³

of publication attached to each and every person who volunteered to publish it.—*Wason v Walter*, *L. R.* 4 *Q. B.* 73.

In 1831 a gallery was for the first time erected in the House of Lords for reporters.—8 *Parl. Deb.* (3) 813.

¹ 70 *Parl. Deb.* (3) 1225, 1254; 149 *Ib.* 947. ² 105 *Parl. Deb.* (3) 190.

³ Whenever one member used to move to exclude strangers, and so made it necessary for the order to be enforced, it was equally competent for the House thereupon to resolve at once to suspend the standing order, and this has often been urged as the all-sufficient remedy and check.—224 *Parl. Deb.* (3) 90. In modern times an improvement has taken place in the procedure. Under an order made in H. C. 31 May 1875, whenever a member calls the attention of the Speaker to the presence of strangers, the motion is put at once to the House without any debate, so as to see whether the

Punishment for breach of privilege.—The pillory was the usual punishment for breach of privilege till 1716. In 1620 two persons were ordered, for contemptuous speeches against the power of Parliament, to be set on horseback without cloak or hat, to wear papers on their breasts and backs, and so to pass to the Fleet prison, where they were immured.¹ For a slander of the Lord Keeper in 1626 the culprit was ordered to stand in the pillory at Westminster, then ride backward to Cheapside, then stand there in the pillory, and then ride back to the Fleet.² In 1716 Parliament began only to fine, and sometimes to reprimand the offender.³ One of the difficulties attending any punishment arose out of the practice, whereby a person charged at the bar and reprimanded was expected to receive the reprimand on his bended knees, and also to express some kind of penitence before he was discharged. At last the inevitable hour arrived, in 1770, when one prisoner was found who would not kneel; and the House seeing the difficulty, abolished this as a condition of such a discharge.⁴

opinion of one member meets with the general concurrence.—*Ibid.* 1176. Moreover the Speaker, and also the chairman of a committee, can at any time order strangers to withdraw.

¹ 8 Parl. Hist. 410.

² *Ibid.* 411. While the pillory was one of the regular punishments, and formed part of the *lex et consuetudo parliamenti*, that punishment has never been repealed by any order of the House, and therefore to this day it would be in accordance with Parliamentary usage still to resort to it. But inasmuch as in 1837 a statute was passed, which utterly abolished it as a punishment upon any conviction in the ordinary courts (though not in terms applicable to the orders of Parliament), it would be singular, if Parliament, after laying down an inflexible rule for all other tribunals, should continue to use this barbarous punishment itself. (1 Vic. c. 23.) And for that reason the pillory may be deemed practically abolished in all cases of breach of privilege.

³ *Ibid.* 414.

⁴ *Re Murray*, 14 Parl. Hist. 894; 1 Pat. Com. (Pers.) 38. As L. CAMDEN (when junior counsel on a trial about this matter) explained it to a jury: "The defendant merely refused to throw himself into that attitude of humility, which he reserved for the occasion of acknowledging his sins and praying for pardon before the throne of the Supreme Governor of the Universe."—5 *Campb. L. Chrs.* 326.

The minority of the House of Commons in defending the early printers of the debates in vain urged, that if the printer be summoned, he ought not to be ordered to go on his knees to be reprimanded by the Speaker. But the majority prevailed. And Mr. Baldwin, printer of *St. James' Chronicle*, and another printer, on

Another difficulty has been raised as to the cognate practice of the House of Commons—not to discharge a prisoner till he had expressed due contrition for his offence. In the case of Gale Jones in 1810, who placarded London with the programme of a debating society, which the House deemed libellous, he was committed and ordered to be kept in prison, till he submitted himself to the mercy of the House, which he refused to do. The Speaker told the House it was usual, not to release offenders till they had acknowledged their offence and expressed sorrow. Some members thought this did not amount to requiring the prisoner to recant, which Whitbread said was the real meaning; and that many men would rather rot in prison than submit to such humiliation. Nevertheless the House refused to release Jones without a petition and some apology.¹

14 March, 1771, went on their knees and were reprimanded accordingly, and then discharged. These were the last printers who kneeled at the bar of the House, the practice of prisoners kneeling being discontinued in 1772 by a standing order then made.—33 *Com. J.* 594; 17 *Parl. Hist.* 311.

¹ 16 *Parl. Deb.* 726; 17 *Parl. Deb.* 658. SIR S. ROMILLY said in reference to this practice, that it was asking too much to require a man to humiliate himself by a formal abjuration of opinion before he was discharged; and such was not necessary in any civil court, though abjuration might be required in a spiritual court.—*H. C.* 16 *Parl. Deb.* 486.

In another case, shortly before that of Gale Jones, an editor of a newspaper, having published a draft report of a select committee on a topic of great excitement, and made it appear to be the final decision of Parliament, he was summoned to the bar, and refused to give any information as to the way in which he procured the paper. He was committed to the custody of the serjeant-at-arms, and afterwards, on petition, to the effect, that he was not aware of his offending, was discharged at once with a reprimand.—*Re Sheehan*, 13 *Parl. Deb.* (3d) 319.

CHAPTER VII.

LIBELS AND COMMENTS ON COURTS OF JUSTICE, REPORTS
OF TRIALS, AND COMMENTS ON PUBLIC MATTERS.*Contempt of Court by interfering with the business.*—

In a country where free speech is the rule, and the fewest possible restrictions to it exist, it would be singular, if the proceedings of courts of justice did not supply a large portion of the material for daily comment. As in the case of proceedings in Parliament, the business transacted in courts of justice comes home to every one, and there is no reason why all that is done there should not be open to every kind of observation both in speech and in the press. To watch and sometimes take part in the business is always a ready means of knowledge as to the working of the Constitution, and to read an account of what is done there gives the most reliable information to all as to the security of their own persons and property, which no other reading so well supplies.¹ And courts, as may be supposed, are sometimes well spoken of, and sometimes the reverse. And as the administration of justice is of equal importance to the making and reforming of the law, and is entitled to be surrounded with a dignity appropriate to its place in the Constitution, the same occasions for collision arise, where free comments are made on the exercise of so high a function. Courts of law must therefore, as in the case of Parliament, be credited with sufficient power to vindicate and protect their procedure against attacks, for as courts are the

¹ BURKE has said, nothing better could be devised by human wisdom than argued judgments, publicly delivered, for preserving unbroken the great traditionary body of the law.—*Burke, Com. to inspect Journals.*

appointed means of adjudicating on all disputes, and for discovering all sufficient materials to that end, their labours would be often futile, if irresponsible volunteers intruded crude opinions and speculations, founded, as they must usually be, on defective data. The first requisite of a court of justice is, that its machinery be left undisturbed; and this cannot be effected, unless comments be all but excluded till the court has discharged its function. The same power to commit summarily for contempt all persons who intrude into the judicial function, and profess to have better and superior means of knowledge, or who suggest partial or corrupt conduct, is thus deemed inherent in all courts of record, though the occasion and extent of this summary jurisdiction have given rise to nice distinctions. It is said to be a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of it.¹ This exercise of power is as ancient as any other part of the common law. If the course of justice is obstructed, that obstruction must be violently removed. When men's allegiance to the laws is fundamentally shaken, this is a dangerous obstruction. That the judges should be credited with impartiality is absolutely necessary.² Therefore to libel or slander the administration of the law by imputing misconduct to the judge or jury is of itself an indictable offence.³ Judges are also protected in other ways. To kill a judge in the performance of his duties is no less than high treason.⁴ Coke says that to draw a weapon at a judge sitting in court was a great

¹ 1 Vent. 1.

² *R. v Almon*, Wilmot, 270. CHIEF JUSTICE WILMOT, who put this doctrine as high as it could be put, and examined the authorities, ended by saying, that the object of courts having the power of punishing by attachment for contempt was "to keep a blaze of glory round the judges, and to deter people from attempting to render them contemptible in the eyes of the public."—*Wilmot, Notes*, 270.

The same judge descanted on the fatal risk of allowing "the authority of courts to be trampled on by pamphleteers and newswriters." This contempt of newswriters—a power not then dreamt of in their period—seems to have been heartily shared by Lord Camden, both as yet unconscious of the hereafter of this Fourth Estate in the realm.

³ *Fuller's Case*, 12 Rep. 42; *R. v Lord G. Gordon*, 22 St. Tr. 175; *R. v Hart*, 30 St. Tr. 1131.

⁴ 25 Ed. III. stat. 5.

misprision, for which the right hand was cut off and the goods were forfeited.¹ To utter threats or reproaches to a judge sitting in court is always an indictable misdemeanour.² In the time of Edward III. an attorney was committed for writing a letter merely stating, that "none of the judges would do any great thing by the commandment of the King or the Queen, any more than of any other of the realm."³ Wraynham was convicted of libelling Lord Chancellor Bacon by saying, that he had done unjustly and was worse than a murderer.⁴ Harrison, for saying to Judge Hutton, "I accuse you of high treason," was fined 5000*l.* and imprisoned, and made to wear papers; leave was given to the judge to bring an action, and such action was afterwards brought and 10,000*l.* damages recovered with ease.⁵ In another case Lord George Gordon published a libel on the judges, which said, among other things, "How long shall those whited walls of counsel command us to be hanged contrary to the law? They make long charges to the juries with a show of justice and religion. They shed our innocent blood for expiable trespasses."⁶ And he was found guilty by a jury.⁷ A municipal corporation in 1788 made and entered in their books a resolution, by which they awarded a person 2,300*l.* on account of his being actuated by motives of public justice and preserving the corporation rights in defending an action brought against him for malicious prosecution, and against whom a verdict for 3000*l.* had passed. The court ordered a criminal information against each of the members of this corporation, for thereby imputing, that the judgment of the court, which was in opposition to the resolution, was wrong. The court

¹ 3 Inst. 140; *R. v E. Thanet*, 27 St. Tr. 821. ² Cro. Car. 503; *Hutton*, R. 131. ³ 3 Inst. 174. ⁴ 2 St. Tr. 1071. ⁵ *R. v Harrison*, 3 St. Tr. 1375; *Hutton*, R. 131; Cro. Ch. 503.

⁶ When the *Letter on Libels*, usually supposed, at the time, to be written by Lord Ashburton or Lord Camden, was published, the court construed the drift of one passage into an explicit charge, that the Court of Queen's Bench intended to defeat the Habeas Corpus Act by introducing a circuitous form of proceeding, and thereby preventing a man obtaining his liberty for two years. *Wilmot, C. J.*, was prepared to hold this a contempt.—*R. v Almon, Wilmot's Notes*, 249. The case was never decided, but the judge had prepared his judgment for the occasion.

⁷ *R. v L. G. Gordon*, 22 St. Tr. 207.

said, that if judge and jury are mistaken, there is a legal remedy, and a party ought to pursue that, and not assert that a prosecutor was actuated by public justice, when the verdict conclusively proved that he was not so actuated.¹ A public writer commenting on a recent trial of a captain for murdering a poor boy on board, and on the verdict of acquittal, said, "The principles laid down by the judge would render it impossible hereafter to convict a murderer or assassin." And commenting on the jury, he said, "They seemingly had set at defiance the clamorous calls of justice and humanity; but public indignation could not be altogether overwhelmed by the impetuous torrent of judicial corruption." This was held libellous against both judge and jury, though the defendant's counsel endeavoured to show, it was only the just comment of an impartial writer on the brutal details of the trial. And in another case a writer, commenting on a trial of an action against a captain who had put a passenger in irons for refusing to help him in fighting an enemy, said "the judge's observations had filled him with horror and indignation, and the judge must be regarded with an eye of suspicion and alarm." This also was held to be a libel.²

Fair comments on the judgments and conduct of judges.—But as there is a wrong way of commenting on judges, so there is a right way. The mode in which judges or justices of the peace perform their duty, and the nature of the judgment given, as well as the conclusions of the jury, if any, are all matters of public interest, and after the conclusion of the judgment can be freely commented on, and whatever the court has treated as facts the critic may treat also as facts. But if the writer profess to have facts and knowledge of his own, then he must take the risk of their amounting to an imputation of libel.³ The conduct and evidence of a witness may also be discussed, though an imputation of perjury must be avoided as wholly unjustifiable.⁴ The qualifications of a person appointed as a judge, and even the circumstances under which he was appointed, and his private character, may be commented upon for the

¹ *R. v Watson*, 2 T. R. 199. ² *R. v Hart*, 30 St. Tr. 1131. See also *post* as to acts of contempt done out of court. ³ *Woodgate v Ridout*, 4 F. & F. 216; *Hibbins v Lee*, 4 F. & F. 243. ⁴ *Hedley v Barlow*, 4 F. & F. 224.

purpose of estimating, whether the judge is a man of honour and integrity. And if the judge himself have published his own views, this is a legitimate challenge to public writers to give their opinions, also taking care, however, to adhere to the established facts.¹

The right of the public to enter Courts of Justice.—

The relation in which courts and judges stand towards the public is altogether different from that contemplated by some of the ancients. The court of Areopagus sat in the dark for the very purpose of preventing the inquisitive spectator watching too closely the demeanour of parties or even the faces of the judges.² But with us judges are easily accustomed to sit in a fierce light, and are always before the observation of all. A court of justice is open to the public; and any person whatever, whether interested or not by reason of inhabitancy or otherwise, is entitled to enter, if there is room for him to be there. All the superior courts are therefore free to the visitation of any one who chooses to attend. This right has never been questioned. Nevertheless it is not an absolute right for any person to go, and insist on choosing his own position, for the regulation of places must necessarily reside in the judge, otherwise his own seat might be taken possession of by the first comer.³ Thus it follows, that the presiding officer, whether he be judge, coroner, justice, or sheriff, has the controul of the proceedings and the power of admission or exclusion according to his own discretion.⁴ In all courts of justice there are occasions, when matters are or ought to be conducted in privacy and to avoid scandal; and it rests with the judge of the court, exclusively and without appeal, to determine when such an occasion has arisen. The propriety of his decision cannot be questioned in any action; for this being a matter within his jurisdiction, and no judge being amenable to an action for anything done in the execution of his office, it follows, that no one has a remedy by way of damages for any mistake. And this is the rule applicable to all courts great and small. But there has sometimes arisen a question, which of the inferior courts is or is not a public court at the time, and so is open to the public. In one case G., a reporter for the press entered and took notes

¹ Seymour v Butterworth, 3 F. & F. 376.

² Athen. b. vi.

³ Garnett v Ferrand, 6 B. & C. 627.

⁴ Ibid.

at a coroner's inquest which excited great interest, and the coroner requested him to leave, and on refusal, with the aid of his servant, turned G. out, who afterwards brought an action of trespass for the assault. And the court held, that the power of exclusion was necessary to be confided to every judge for the due administration of justice, and there was no remedy by action against him for any apparent arbitrary conduct.¹ It is true, that, though the public are admitted to witness trials in courts of justice, yet they are not thereby authorised to express any opinion whatever on the proceedings, for this would lead to disturbances incompatible with the severe impartiality aimed at by all tribunals; and therefore to indulge in any outburst of joy or pity is itself a contempt of authority.²

Right to publish reports of courts of justice.—That the proceedings of courts of justice should be open to the newspaper reporter or any volunteer has always been held a first principle, requiring no argument, the public advantage outweighing the inconvenience to those whose affairs are the subject of litigation. In short, to publish these reports is merely to extend the audience and enable those who are not present to hear and see what took place as if they were present.³ Courts of law seem never to have gone the length which Parliament went, and which in form it still maintains, in treating the publication of their proceedings as *per se* a contempt; and yet some traces of a like jealousy and suspicion are found in former times. In the time of Edward III. it is said, that a notary public was committed to the Tower for merely taking a note in court of the proceedings.⁴ And Scroggs, C. J., in 1679, appointed a particular printer to publish a report of a trial, and he prohibited all other persons from presuming to print the same.⁵

One ground on which reports of legal proceedings are

¹ *Garnett v Ferrand*, 6 B. & C. 628.

² Holt, as counsel in a trial for assault, complained of the spectators hissing.—*R. v Bether*, 8 *St. Tr.* 759.

³ *Popham v Pickburn*, 7 H. & N. 89.

⁴ See *Flint v Pike*, 4 B. & C. 473.

⁵ 7 *St. Tr.* 765. The practice of newspapers introducing reports of proceedings in courts of justice is said to have begun about the end of the reign of George II.—5 *Camp. L. Chrs.* 52; 6 *Ibid.* 54.

sometimes said to be open to all is, that the primary object is to convey useful knowledge. But whether such knowledge is useful or entertaining or merely ministers to the lower passions of revenge, envy, and the keen desire to sympathise with the misfortunes of one's neighbour can be of little consequence, and cannot be inquired into. It is enough that, as courts and judges exist solely for the good of the public, and every one has as much interest as another in knowing what courts say and do in discharging their duties, no reason can be shown, why their proceedings should be kept in the dark. The only way, by which the equal interests of all the subjects in this department of public business can be maintained and given effect to, is by allowing any volunteer to publish and circulate amongst the many what can only be witnessed by very few. But inasmuch as legal proceedings include details of evidence which are indecent or blasphemous, the publisher is bound at his peril to abstain from publishing these, as they cannot in any view benefit society; and however accurate his account may be, he will, according to circumstances, be as much liable for the indecency and blasphemy as if he himself invented it. A publisher or reporter is bound to know, that no privilege or immunity will protect him in such cases.¹

When published reports of trials are treated as contempts.—The publication of legal proceedings is, as already stated, often treated as a contempt, because the publication if premature interferes with the proper function of the court by disturbing the minds of judges as well as of juries and bystanders. This is a doctrine which by no means conflicts with the most ample liberty on the part of each member of the public to exercise his own right of comment after the decision has been given, and after the matter is past and ended. The writers in newspapers have an unbounded latitude in expressing opinions on every view of a case, and, if they please, of showing the public how they themselves would have decided it in a more satisfactory way; nevertheless, by the law of the Constitution, it being assigned to judges and courts alone to dispose of this kind of business, and they being treated

¹ R. v Carlile, 3 B. & Ald. 167.

as the sole depositories of the means of justice, and the accredited oracles as to everything that is doubtful, all the materials that it is possible to accumulate are laid before them for this sole end, and on this very account these materials are, or ought to be, the best accessible in the circumstances. It would cause endless confusion and disturb the functions of the courts, if volunteers were to be allowed, in the middle of the business, to rush in and, without having equal or indeed reasonably good opportunities, were to presume on their superior intuitive sagacity or knowledge, or pretend to a better judgment than the Constitution has provided for the disposal of each case. And this interference is not the less prejudicial, because the court may not have known of the interference, or, if it had known, would have risen superior to the misleading influence of any of the proffered suggestions.

While therefore it might well be deemed, on account of the public interest affected, an indictable offence for any person to interfere by publishing comments, or even publishing *ex parte* statements of accounts of pending causes, calculated to mislead the public and embarrass the courts and juries engaged in deciding the cause, yet it has not been the practice to prefer an indictment, because a summary process is much more effectual, namely, an application to the judge or court to commit the offender for contempt. The usual ground of contempt on these occasions was the publication of a trial or hearing before it was concluded. Lord Hardwicke, in 1742, said "one object of courts committing for contempt was in order to keep the public from being prejudiced against persons before the cause is heard." And that seems the main object so far as printers are concerned. Another object is "to prevent the judges being scandalised and depreciated." He accordingly committed a party for publishing his brief, before the cause came on to be heard, and so prejudicing the public mind.¹ And to publish an affidavit filed in some preliminary stage of the cause with comments upon it, suggesting more or less, and anticipating a certain decision, is also ground of contempt.² So where a solicitor of one of the parties

¹ Roach v Gowan, 2 Atk. 469.
² 7 Eq 55 n.

² Tichborne v Tichborne, L. R.

published in a newspaper his version of the facts, this was held a contempt.¹

Publishing reports of a trial which occupies many days.—It is true that, when a trial takes place from day to day, there is some inconvenience in allowing daily reports of what takes place. But inasmuch as this publication is in reality a communication of what has already been heard in court by those of the public who were present, to the larger audience outside, and so putting a greater part of the public in the position of auditors, no reason exists for preventing such a daily report being published or for restraining any account being given till the whole trial is over, so long as in these daily reports comments and all remarks tending to partisanship are avoided. In 1821, on the trial of Thistlewood, Abbott, C. J., at the commencement of the trial stated, that as there were several prisoners included in that indictment who had severed in their defences and whose trials would take place one after the other, the court deemed it improper that any report of the first trials should appear till the last had concluded. And one newspaper proprietor having on the seventh day published without comment a report of two of the cases which had up to that date ended, with the result of the verdict, but a third case was still untried, he was committed for contempt; and the whole court held, that to do this was within the powers of the judge.² But since that time this view has seldom been acted on, and benefit has been found to result from daily reports of trials, by inducing witnesses to come forward, who may be able to advance the interests of justice. And for a like reason, namely, any obstruction of the free course of justice, if a party were to advertise a reward for witnesses to prove certain facts, this would be treated as necessarily leading to partiality, corruption, and perjury, and so a contempt of court.³ So though no contempt nor anything disrespectful may be intended, it is a serious obstruction of justice for any one to publish in a public newspaper or book part of the pleadings or

¹ *Daw v Eley*, L. R. 7 Eq. 49.

² *R. v Clement*, 4 B. & Ald. 218; 11 Price, 68. LORD CAMPBELL thought this was, at least, an injudicious decision, and contrary to the later practice.—3 *Camp. C. J. J.* p. 308.

³ *Re Farley*, 2 Ves. Sr. 520.

proceedings before the cause has been heard in court, or even to publish an account calculated to prejudice the hearing, for thereby public opinion may be grievously misled and trifled with; as, for example, by threatening to indict witnesses for perjury;¹ or by publishing a petition for winding up a company before the hearing of the case.² When however a suit or proceeding in court has quite ended, and comments are published to the effect that justice has not been done, or otherwise, the courts are no longer under the duty of interfering, and the subsequent remedies may be left to other courts in the ordinary way. Yet where final judgment has been given, but has not been drawn up, the matter is treated as still pending, and the courts have asserted a right to protect litigant parties when they are abusing or slandering or libelling each other after the court has discharged its function of adjudication.³

What is a court of justice.—The question often arises on such occasions, What is a court of justice? and here some distinctions require to be made. One of the main tests is, whether the particular court or place is at the time open to the public, for if so then all parties interested being likely to be present, or at least to have the opportunity of being so, it is for the time being a final and concluded proceeding. Hence the sitting of a registrar in bankruptcy held in a prison to take the examination of a debtor therein confined was held to be a court of justice, because notice was given to the parties interested to attend, and it is of public interest to know how any prisoner is dealt with.⁴ So was a sitting of examiners in an election petition to inquire into the sufficiency of sureties.⁵ And the interest attending decisions of a court of justice extends to the contents of public documents made accessible to the public under statutory authority and having the effect of a decree of a court, as, for example, the list of protested bills of exchange.⁶

Reports of ex parte proceedings in courts of law.—

¹ *Littler v Thompson*, 2 Beav. 129; *Tichborne v Mostyn*, L. R. 7 Eq. 55. ² *Re Cheltenham Co.*, L. R. 8 Eq. 580; *Daw v Eley*, L. R. 7 Eq. 49. ³ *Exp. Turner*, 3 M. D. & De G. 544. ⁴ *Ryalls v Leader*, L. R. 1 Exch. 296. ⁵ *Cooper v Lawson*, 8 A. & E. 746. ⁶ *Fleming v Newton*, 1 H. L. C. 363.

A report of the proceedings that take place in any court of justice, where both sides are heard and a decision given, though involving defamatory matter, can seldom give rise to an action. But the case of *ex parte* proceedings and of proceedings which are beyond the jurisdiction of the court, but nevertheless have been to some extent entertained in a public manner, long caused a difficulty. If an *ex parte* proceeding such as a charge made of an indictable offence before justices be dismissed, a report of such case stating the result cannot be a cause of action.¹ And though at first some judges doubted whether a report of an *ex parte* proceeding such as a preliminary examination of an accused person before a justice of the peace was always justifiable, it has been recently established, that a correct and fair report of these proceedings is as lawful and unexceptionable as of final judgments in any court.²

Reports of applications to courts which have no jurisdiction to entertain them.—Again still another distinction was drawn between reports of matters coming within the jurisdiction of courts, and those which do not. If, for example, a volunteer makes an application to a court and founds upon it some claim for redress, and in course of doing so makes statements which are slanderous, it has been held nevertheless that the publisher of a correct and fair report is not liable to any action, because all courts are liable to have applications made to them which turn out on examination to be beyond the jurisdiction; and the conclusion of the court on any preliminary application cannot be arrived at till after some details are stated. And it cannot be reasonably expected, that reporters and bystanders can judge when a matter is or is not within the jurisdiction of courts.³

Reports of trials must be fair and without comments interspersed.—While therefore it is lawful for any one to publish a report of a proceeding in a court of justice, still this must be a fair and authentic report of what happened. If the report is mixed up with comments showing an *animus* against a party, and giving an unfair impression, the publisher then ceases to have the

¹ *Lewis v Levy*, E. B. & E. 537.

730; L. R. 4 Q. B. 94.

² *Wason v Walter*, 8 B. & S. 319; *Ryalls v Leader*, L. R. 1 Exch. 300.

benefit of this absolute right of publication.¹ And this is still more so if the comment involves some new fact.² Hence one who reports or publishes an account manifestly one-sided should take care to let it clearly appear, that one side only was heard; and no comments of the reporter should be interlarded or added, tending to suggest a partisan view of the case. Report and comment should always be kept separate, and it should be recollected, that the conclusions drawn by a bystander are in general wholly immaterial and misleading, for the judge or jury alone are to decide the proper inferences to be drawn for the time being.³ And a sensational heading to the report is deemed a comment in the above sense.⁴ And for like reasons a party is not justified in publishing without discrimination everything that falls from the mouth of counsel.⁵ Everybody knows, that the statement of a counsel is *ex parte*, and that he is often instructed to make allegations which it is afterwards impossible to support in proof. And though it be lawful for counsel thus to utter matter injurious to individuals, the subsequent publication of this has no such protection, and may be actionable.⁶ For example, to insinuate that a witness had committed perjury is wholly beyond the province of the reporter, for it is for the judge and jury alone to deal with that conclusion; and every witness on his oath is entitled at least from bystanders to have his statement taken and fairly represented as he gave it, it being exclusively the business and main function of the court to estimate and weigh it.

How far the report must be verbatim or abridged.—

With regard to the accuracy of the report of proceedings in courts of justice, it is not meant, that there should be a verbatim report. Any summary of various length may be as accurate as a verbatim report, and in general is the only practicable kind of report. All that a reporter usually requires to do is to give such account of what he has heard as an intelligent bystander would give when relating it

¹ *R. v Fleet*, 1 B. & Ald. 379.

² *Cooper v Lawson*, 8 A. & E. 746.

³ *Lewis v Levy*, E. B. E. 544; *Stiles v Nokes*, 7 East, 453.

⁴ *Lewis v Clement*, 3 B. & Ald. 702.

⁵ *Saunders v Mills*, 6 Bing. 213; *Lewis v Walter*, 4 B. & Ald. 605; *Roberts v Brown*, 10 Bing. 525.

⁶ *Flint v Pike*, 4 B. & C. 473.

⁷ *Roberts v Brown*, 10 Bing. 519; *Cooper v Lawson*, 8 A. & E. 746.

afterwards, the reporter's function being merely that of giving eyes and ears to the absent.¹ And some discretion is required as to the parts of a case which should be reported and the proper proportions of those parts. If, for example, the statement of facts made by one counsel should alone be given, that is to say, his version of the facts which he intended or expected to prove, and an account of the facts actually proved thereafter was omitted or slurred over, an unfair report might be the result, seeing that counsel often without any fault of theirs make allegations, which it is afterwards impossible to support in proof.²

How far contempt punishable if act is done out of court.—The contempt of a court may be committed by words used in presence of the court itself, if these words imply either from their meaning or the gesture and manner accompanying them, that an insult is intended and understood. For the bystanders of the moment may from the use of such language conceive a contemptuous opinion of its authority, if no remedy be available.³ Each court is presumed to know its own law and to put the right interpretation on the character of the act done, so far as it is contemptuous, for if the contempt is by a gesture none but the court can judge of it.⁴ On this subject a useful distinction was drawn, when it was held, that, if the words used are spoken in presence of the judge himself, this may be punished summarily by attachment for contempt; but if the words were used elsewhere than in court, the proceeding should be by way of indictment, as no great urgency is then required. And this may be said to be the rule as to inferior courts. In 1743 a court-martial passed a resolution reflecting on certain comments made by a Chief Justice, who had tried an action against the president for an illegal sentence on a prior occasion, and this resolution was sent to the king. The Chief Justice committed all the members of the court-martial, whereupon they wrote a contrite submission to be read in court, after which they were released.⁵ In 1808, after the trial and acquittal of a ship's captain charged with murdering one

¹ Andrews v Chapman, 3 C. & K. 289. C. 473; Saunders v Mills, 6 Bing. 218. ⁴ Re Pater, 5 B. & S. 299. L. Lib. 158.

² Flint v Pike, 4 B. & Wilson's Case, 7 Q. B. 1015. ⁵ Willes, C. J., Holt,

of the crew, a newspaper writer wrote an article, insisting that the prisoner had been guilty, and censuring the judge and jury for acquitting him. The article was a mere declamatory invective, and without any fair and temperate discussion of evidence; and the writer was indicted and convicted, and sentenced to three years' imprisonment.¹ And where the writer in commenting on a recent trial and execution for murder imputed corruption to the judge, the defendant was found guilty of a seditious libel.²

The libels for which a superior court may commit are thus not merely those published in the court or the immediate neighbourhood, but include those which are published at a considerable distance, and though the court was not sitting at the time of publication.³ And a solicitor, who published a pamphlet relating to a recent judgment, describing it as wholly beside the merits of the case, and as having as its only object to deter solicitors from exposing abuses in the court, was committed for contempt.⁴ And in another case, where an unsuccessful applicant wrote a letter to the judge using a threat, tending to induce him to alter the decision, that was deemed a contempt for which an attachment issued.⁵ A letter offering money to the judge is also treated as a gross contempt.⁶ It is equally a contempt to send a letter, threatening a party or witness if he attend the court, or publishing insinuations that they are perjured.⁷ And where a judge had cleared his court of the public owing to excessive noise, and the high sheriff resisted this, and told his officers to admit the public, as it was an unlawful proceeding to exclude them, the latter was fined 500*l.* for this as a contempt.⁸

What courts can commit for this contempt.—This power to commit for contempt was said to be a necessary incident to every court of Justice, whether of record or not.⁹ Wilmot, C. J., insisted, that not only could a judge

¹ *R. v White*, 1 Camp. 359.

² *R. v Sullivan*, 11 Cox, C. C. 57.

³ *Crawford's Case*, 13 Q. B. 613; *Charlton's Case*, 2 My. & Cr. 316; *R. v Onslow*, L. R. 9 Q. B. 219.

⁴ *Exp. Turner*, 3 M. D. & De G. 523; *Exp. Jones*, 13 Ves. 237.

⁵ *Re Charlton*, 2 My. & C. 316;

⁶ *Martin's Case*, 2 R. & My. 674. ⁷ *Smith v Lakeman*, 26 L. J. Ch. 305; *Shaw v Shaw*, 2 Sw. & T. 515; *Re Mulock*, 33 L. J. Prob. 205.

⁸ *Re Sheriff of Surrey*, 2 F. & F. 237.

⁹ 1 Vent. 1.

of a court of record commit for contempt when he was sitting in the Court, but he had the same powers when doing any judicial business, even in his private chamber, or in the judge's chamber auxiliary to the court. But this has on further examination been deemed to be too wide, and the line has been drawn between a judge sitting in open court and sitting *in camera*, in which latter case no power of committal for contempt is inherent.¹

Courts of record are usually divided into those of a superior and of an inferior kind. And the superior courts have been held to include all the highest courts, the House of Lords, the Judicial Committee of the Privy Council, the Supreme Court and High Court of Justice. This class also includes courts of assize and judges sitting at *nisi prius* and the Central Criminal Court.² And the Court of Quarter Sessions is also classed among the superior courts in this respect.³ With regard to all these courts the important characteristic is, that the commitment need only mention, that the party committed a contempt of court, without stating further particulars, it being deemed conclusive, and as if the court could not go wrong in such a matter.⁴

Punishment for contempt.—The mode of punishment for a contempt of court is fine or imprisonment, and neither the extent of the one nor the duration of the other is settled. In one old case, the party committed, being a barrister—for tampering with a witness in the Popish Plot—besides being fined and imprisoned, had his gown pulled over his ears by the tipstaff.⁵ It is however a general rule on this subject, that when a commitment is in the nature of a punishment, and not like a commitment of a party till he answer, which is rather in the nature of process, it ought to be certain as a sentence. No English court, if their attention were called to the point, would commit by way of punishment except for a time certain.⁶

¹ *R. v Faulkner*, 2 Mont. & A. 338, 344. ² *Re Fernandez*, 10 C. B., N. S. 3; 6 H. & N. 717. ³ *R. v Clements*, 4 B. & Ald. 223; *Re Pater*, 5 B. & S. 300. ⁴ *Crawford, re*, 13 Q. B. 613, *Re Pater*, 5 B. & S. 299. ⁵ Bac. Abr. Court E.

⁶ *Re Crawford*, 13 Q. B. 628. In the case of Bingley, a book-seller who was charged with contempt of the Court of Queen's

Contempt of inferior judges and courts.—Sometimes this kind of disrespectful language is used towards justices of the peace, as by calling them fools, knaves, and rascals. And some of the older authorities seem to assume, that a justice of the peace may for words of contempt uttered in his presence commit the party to prison;¹ though perhaps these powers were understood to apply only to binding over the party to keep the peace. For words contemptuous of a justice of the peace uttered in his presence seem not even to be indictable, far less to be matter for which the speaker may be committed.² At least where the words are spoken of a justice, but not in his presence, the words are not indictable.³ And though the older authorities are confused and contradictory as to whether a justice acting as such can commit a party for contempt in his presence, at all events he must at the very least make out a warrant of commitment specifying the term of imprisonment.⁴ And it would probably require a masterly hand to draw such a warrant of imprisonment as would withstand the remedy of habeas corpus.⁵

A county court is classed among inferior courts, and though it has power given by statute to commit for a contempt done in the face of the court, its power does not extend to contempts committed elsewhere.⁶ And as regards the ecclesiastical courts, the mode of procedure is limited to this, that the judge must certify the contempt, whether committed in the face of the court or not to the Lord Chancellor, who thereupon issues a writ *de contumace capiendo* to arrest the party.⁷

Comments on conduct of public officers.—While it is open to any member of the public to comment either in

Bench, he was, on refusing to answer interrogatories, committed to prison, where he was detained two years, still refusing during all that time to submit to the jurisdiction of the court. At last the Attorney-General moved for his discharge, on the ground that his imprisonment had been of longer duration than he might have suffered if he had received judgment for the original offence.—16 *Parl. Deb.* 469.

¹ *Cro. Eliz.* 78; *R. v Revell*, 1 Str. 420; *R. v Langley*, 2 L. Raym. 1030. ² *R. v Pocock*, 2 Str. 1157; *Ex p. Chapman*, 4 A. & E. 773.

³ *R. v Weltje*, 2 Camp. 142.

⁴ *Mayhew v Locke*, 7 Taunt. 62;

R. v James, 5 B. & Ald. 894.

⁵ *Howard v Gossett*, 10 Q. B. 452;

See 2 Pat. Com. (Pers.) 212.

⁶ *R. v Lefroy*, L. R., 8 Q. B. 134.

⁷ 2 & 3 Will. IV. c. 93, § 1.

words or in print on the conduct of Parliament, of courts, and all the high officers of state, it equally follows, that every kind of public officer of inferior degree is also subject to a like treatment, whenever he fills some office which is maintained at the public expense, or performs duties which are essentially public even at his own expense, as for example justices of the peace and some officials in Government offices. The clergy of the Church of England in their mode of conducting public worship are also in the performance of a public duty, for by virtue of statutes the Church service is ordered and can be compelled to be rendered for the benefit of the whole people and not merely of the parishioners. And hence any comments made in the public press or otherwise on the mode of discharging this duty may be made as freely, as is the case with respect to other public officers performing their duty.¹ At the same time the sermons of dissenting clergy, who are under no public duty to deliver them, cannot be deemed public in the same sense, though their chapels come under the category of places to which the public are invited, and so on another ground are fairly open to a like treatment. The conduct of a parish priest in managing a charity subscribed by a few of his parishioners may be in no sense a public act, and does not lie open to public comment;² and yet those who manage an hospital for assisting poor inhabitants fill a public situation.³

Comments on private persons who challenge or invite public notice.—Not only is the right of comment applicable to all kinds of public officials, high and low, but there are also great numbers of private persons carrying on businesses and pursuing occupations, who openly invite and challenge this public comment. Thus persons selling goods in shops, though usually avoiding publicity on a large scale, sometimes go out of their way to attract public notice by advertisements magnifying the value of their wares. In one case a marine store dealer issued a

¹ *Kelly v Tinling*, L. R., 1 Q. B. 699; *Gathercole v Miall*, 15 M. & W. 319. It does not follow that all things done by a clergyman are public acts, as, *e.g.*, his acting as trustee in a private charity.—*Ibid.*

² *Gathercole v Miall*, 15 M. & W. 319.

³ *Cox v Feeny*, 4 F. & F. 13.

handbill, stating the prices he gave for kitchen stuff of various kinds. A daily newspaper published an article commenting on the handbill and treating it as of a nature to encourage servants to rob their masters; but there was no imputation on the personal honesty or integrity of the individual shopkeeper. This was held not only legitimate but salutary criticism, not exceeding the limits of discussing such matters as challenge the attention of the public; and the jury rightly found their verdict for the defendant.¹ And where comments were made on a published correspondence relative to the abuse of a parish church by the incumbent allowing books to be sold during divine service and allowing cooking operations in the vestry room, this was deemed fair subject for reprehending the incumbent's conduct.² So it is with one who presents petitions to Parliament imputing disgraceful conduct to public men;³ also those who as medical men advertise a new mode of curing disease hitherto deemed incurable.⁴ The performances at theatres and their conformity with advertisements may also fairly be criticised.⁵ When the Queen's printer published reports made by the Admiralty as to the merits of building turret ships for the public service, this was also deemed pre-eminently a public matter; and though the plaintiff's plans had been represented as worthless, he had no right of action against anybody.⁶ And where a public writer in commenting on the conduct of a person, at a public meeting held to promote the election of a member of Parliament, insinuated that the plaintiff persisted in interrupting the meeting as a headstrong supporter of an opponent, this was deemed fair matter of public interest, for which no liability was incurred.⁷

Comments and criticisms of books, pictures, &c.—The books published by authors, and which the public are invited to buy, have always been treated as matters of public interest; and so are pictures offered on exhibition to the public, or drawings of new architectural works. To allow criticism tends to secure purity of taste and of morals, and

¹ *Paris v Levy*, 9 C. B., N. S. 362. ² *Kelly v Tinling*, L. R., 1 Q. B. 699. ³ *Wason v Walter*, L. R., 4 Q. B. 73. ⁴ *Hunter v Sharp*, 4 F. & F. 983. ⁵ *Dibdin v Swan*, 1 Esp. 28. ⁶ *Henwood v Harrison*, L. R., 7 C. P. 606. ⁷ *Davis v Duncan*, L. R., 9 C. P. 606.

a higher standard of knowledge and competency in all authors; and therefore a free handling by critics is always to be desired, and has a wholesome effect, by commending good workmanship on the one hand, and chastising dunces on the other hand for venturing to deal with matters for which they are unfitted.¹ It is true that some judges often draw the line at a point, where personal ridicule is resorted to, and say that that is an abuse and cannot be permitted; but others think, that ridicule is only another name for fair criticism, and much must depend on the degree and on the surrounding circumstances. As Lord Ellenborough, C. J. said, every person who publishes a book commits himself to the judgment of the public; and any one may comment on his performance. If the commentator does not step aside from the work or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right.² In one case an author of a book on travels was caricatured in a drawing as standing in a ridiculous attitude, bending under the weight of two copies, and with all his wardrobe tied up in a pocket-handkerchief, and Lord Ellenborough ruled, that this was not unfair ridicule of the bad taste and inanity of the author; and if, as the author alleged, his book had become unsalable and he had lost a publisher for another forthcoming work of the same kind, this was deemed merely *damnum absque injuria*—as an unavoidable incident for which no legal remedy exists.³ No limit can therefore be set to the contempt and ridicule, that may be awarded; it is only when the critic deviates from his own strict function, and seeks without any reasonable cause to impute fraud, or immorality, or corruption, or some base motive bordering on crime, that he becomes amenable to an action of libel. And the more irrelevant the charge, the more easy is it for a jury to infer an intention to injure the author rather than a fair discharge of his own special business.⁴ Thus rival editors may

¹ *Tabart v Tipper*, 1 Camp. 351; *Carr v Hood*, 1 Camp. 358; *Thompson v Shackell*, 4 M. & M. 187; *Soane v Knight*, 1 M. & M. 75.

² *Tabart v Tipper*, 1 Camp. 357. ³ *Carr v Hood*, 1 Camp. 358. ⁴ *Ibid.* *Macleod v Wakley*, 3 C. & P. 313; *Strauss v Francis*, 4 F. & F. 1113; *Campbell v Spottiswoode*, 3 B. & S. 769; *Stuart v Lovell*, 2 Stark. 97.

fairly comment on each other's performances, though one may go to excess by inserting a warning to advertisers as to the low circulation of the adversary.¹ So one editor was held to exceed, by imputing to another editor of a religious paper who advocated missionary enterprise, that he was an impostor and was using fictitious names to draw contributors to his newspaper and fill his own pockets.²

With regard to all these comments upon those who are proper subjects of comment, it must be borne in mind that the mere honest belief in the writer that he is doing a just and spirited thing is no defence, and does not preclude a remedy to the victim of his attack. An author's character is more entitled to protection than the writer's display of his perverted talent and reckless invective before the eyes of anonymous readers.³ The reputation is a known, substantial, and clearly-defined property; the right of free speech in such circumstances is somewhat shadowy at best, and its effects are unknown and unascertainable. And examples of this will appear in a subsequent chapter.

¹ *Heriot v Stuart*, 1 Esp. 436.

² *Campbell v Spottiswoode*,

3 B. & S. 769.

³ *Wason v Walter*, L. R., 4 Q. B. 96; *Hunter v Sharp*, 4 F. & F. 1005; *Campbell v Spottiswoode*, 3 B. & S. 769.

CHAPTER VIII.

ABUSE OF SPEECH AND WRITING BY DEFAMATION.

Libels on personal reputation.—In the preceding part of this volume those rights of thought and speech have been dealt with, which are enjoyed in their most positive form, yet the exercise of which seldom affects individuals. Those excesses only were considered, which had an effect on the public generally, and on the Government which represents the public. Blasphemy, immorality, and sedition touch only the highest representatives of order, such as the Sovereign, the ministers, the Parliament, and the judges and public officers and officials of lower degree. Those may well be called public libels. Last of all, we now come to examine more closely those excesses in the exercise of the same free thought and speech, which involve collisions between man and man, and where the result is chiefly a question between one individual and another individual. These are properly called defamatory or personal libels.

The character or reputation which, as already explained,¹ cannot fail to be acquired by each individual in the course of life—which is often the fruit of sedulous care and long self-restraint, and which is the means of power and often the sole means of livelihood of the great majority of mankind—is liable to be assailed by imputations which detract from the weight and value of these good qualities. While the free tongue and pen of others must have scope, these, nevertheless, may impute, either designedly or accidentally, either maliciously or falsely, or even truly, something which has an immediate evil effect on the reputation of another, and

¹ See *ante*, p. 6.

thus is usually a ground for some legal remedy. But it is not every injury to reputation which can be redressed, any more than every free speech which can be punished or visited with damages. There are bounds described on both sides to the injury as well as to the redress. Free speech has a large arena to discourse in, and character may suffer much from the lighter attacks which no law can restrain or vindicate. The shafts of ridicule and wit, the silent sneer, the studied whisper, and the ready shrug may make havoc of reputations, and yet there may be no redress. Some things are too frivolous for the law to notice, too transitory to be transfixed, too subtle to be detected, too delicate for its coarse tests and processes. Nice distinctions must be drawn, so as neither to silence indignation, censure, or detraction where these are justifiable, nor to extinguish reputation where there is no adequate advantage to be gained and no other person's interest or happiness is thereby enhanced. To comprehend all these occasions of collision considerable detail is now necessary.

Difficulties in defining personal libel or slander.—

It has been already seen how difficult it was to define a blasphemous, immoral, or seditious libel. The difference between these and a defamatory libel or a libel on individuals is so great, that they can scarcely be classed together, and the characteristics of the one cannot be compared with those of the other, except that they both in some way qualify the primary right of free speech. The same difficulty has attended most of the attempts to define a defamatory libel, and numerous varieties of phrase have been resorted to, but without much success. Nearly the whole difficulty has arisen from two words which tend to mislead, and which are constantly used with little attention to precision or logical sequence; these are the words "malice" and "privileged occasion or privileged communication." The exception is often mistaken for the rule; as, for example, by starting with the assumption, that all libels are malicious and actionable, except a few which are called privileged. But this rather inverts the order of things, as a little consideration will show. The great primary right of each is to speak and write of all other persons, as his interest leads him. It is self-evident, that the vast majority of mankind go through the world without perpetrating either slander or

libel. They find a way of exercising their faculties to the fullest extent, and filling all the situations of life creditably, without committing either the one excess or the other. They can express "of and concerning" their neighbours everything useful or interesting to themselves and needful for their occasions without coming into collision with these neighbours, and for this reason, that most people instinctively confine themselves to their own immediate business without interfering with that of others; and the secret of acquiring this masterly evasion of all the points of collision is the same in this department of the law as in most others. It is only, after seeing that the reputation of third parties suffers from the exercise of this primary right of free speech that it becomes necessary to examine, whether at the moment of the alleged slander or libel the person uttering it was in the pursuit of such part of his own lawful business as the law protects. If he was so employed, then the law says, that this lawful business is to be allowed free course, regardless of the effect upon another's character, the latter result being in that case unavoidable, and therefore excusable. But if the libeller was not in the prosecution of any such lawful or rational interest of his own, then the reputation of the third person must be protected. It is properly presumed in that case, that the libel was a mere voluntary, reckless, studied attack, having for its object to cause pain, and mischief, and loss of influence to his neighbour, because by the law every man's property is to be protected against all officious interference. Hence all the law ranges round two great centres. One is to define, when it can be said, that the alleged libeller is in pursuit of this lawful business of his own, which is to be first of all protected, regardless of the effect on third parties. The other centre is to define, what is the kind of attack upon another's reputation which is to be punished or restrained at the expense of the attacking party. The former class of circumstances are somewhat unaptly called "the privileged occasions," and the latter class of circumstances are called the characteristics of libel in its effects on a third party's reputation. As elsewhere stated, it would have been more methodical to call the former "excusable libels," and the latter the restrictions on the freedom of comment on our neighbours. But it matters little which words

are used, if they are used with something approaching to precision.

The definition of libel and slander of individuals.

—Slander is usually confined to words spoken, while libel is applied to words written or printed, or some picture or sign of a durable kind. A libel has been defined to be “a malicious defamation expressed either in printing or writing, or by signs, pictures, &c., tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule.”¹ This is the definition usually employed, and particularly the last words, which describe the effects of the attack on reputation which the law will punish. But having regard to what has been already explained, a more orderly definition of defamation seems to be this, “An attack made upon another’s reputation by one who is not at the time engaged in any business of his own which the law protects.” In order to comprehend this, it is only necessary to explain, what is meant by an attack on another’s reputation and the medium by which it is done, and secondly, what is that lawful business of one’s own, which the law protects. When these two phrases have been enlarged upon, the constituent elements of defamatory libel are known.²

Distinction between slander and libel.—But before proceeding further it is well to state more clearly the distinction between slander and libel, which both agree in this, that each involves a wrong, or an attack on the character and reputation of another. Although each wrong works its evil effect by producing in the minds of third parties a reduced estimate of the worth and value of the character assailed, yet different considerations at once arise according as the medium of attack is speech or writing; and writing is used to include printing. The Romans marked the distinction also, calling slander *injuria verbalis*, and libel

¹ Dig. L. Lib. 1.

² The following definitions may be added. “A libel is a contumely or reproach published to the defamation of a private person.”—*Com. Dig.* “A publication injurious to private character or credit of another.”—*Addison on Torts*. Numerous miscellaneous definitions are collected in *Townshend on Libel and Slander*, and in *Morgan’s Laws of Literature*.

libellus famosus, though as printing was then unknown, the distinction was far less notable and emphatic than it is with us. This distinction, more or less fundamental, is founded on the degree of publicity which the slander acquires, for the law naturally and properly attributes greater importance to it, according to the extent of the mischief which is presumably done. If a slander against A is uttered to A, and there is no bystander but one, the worst that can happen is that A's character will be gone or will suffer eclipse in the estimation of that one bystander. But if the same slander is uttered in presence of a hundred bystanders, or a thousand, or if it is put in writing, and then through the medium of a newspaper or pamphlet, thereby reach thousands of minds, one can see at a glance, how greatly the mischief is intensified in the latter cases. This is a distinction which is real and not nominal, and requires different treatment to be dealt out to spoken and written slander, and different remedies and punishments assigned. And hence not a few writers have wondered, that this difference should exist, and especially that it should depend as they have thought only on the circumstance, that the defamation in one case is spoken, and in the other case is committed to writing. The real distinction does not turn on the mere act of speaking or writing, but on the circumstance whether the vehicle of slander is such as will naturally or probably carry the slander farther. Words, as Holt, C. J., said, were transient, and vanished in the air as soon as spoken, and there can be no terror of them.¹ It is because spoken slander is usually confined only to a few bystanders, and written slander reaches a wider and illimitable circle, that the law has drawn this well-settled distinction between spoken and written defamation, and which runs through a variety of details, as will be afterwards seen. The distinction is not in all cases sound and just, for a slander may be spoken to an audience of a thousand, and a written slander may reach only a select circle of two, or ten, or one hundred. This is only one of many illustrations of the law, for the sake of its more easy application, laying down and adhering to a rough and ready test rather than wasting time over

¹ 3 Salk. 225.

the minutiae of injustice, inasmuch as it is more easy to prove whether a matter is spoken or written than whether it reaches ten or ten thousand listeners. This is the sole reason why the distinction is, upon the whole, just and unassailable, and at all events more easily applied than any other distinction that can be suggested. And moreover, as a jury is always intrusted with the ultimate assessment of damages, the theoretical inequalities are easily adjusted by its own inherent power of adaptation to ever-varying details.

Practical effect of distinction between slander and libel. — This distinction between spoken and written defamation has puzzled many and has even called forth censure from some who have overlooked both the source and the reason of the distinction. Mansfield, C. J., after prominently noticing the distinction and asserting that the spoken word was often more malignant and widespread in its effects than the written word, would gladly have abolished and repudiated any distinction between them, either in the remedy or the punishment, but, as Hale and Holt and Hardwicke had adopted and endorsed the distinction, it was too late for him to interfere.¹ And he observed, that the tendency of the words to provoke a breach of the peace or the degree of malignity involved has nothing to do with the question. And other judges have from time to time reverted to it as an old and stubborn anomaly, but without tracing its origin with sufficient closeness.² The chief distinctions that result from slander or spoken words, and libel or written and printed words, are, first, that spoken words will sometimes not be actionable, while the same words written or printed will be so; but if the same spoken words are followed by special damage,

¹ *Thorley v Kerry*, 4 Taunt. 364.

² Per Best, C. J., *Tuam v Robeson*, 5 Bing. 21. "Words are transient and fleeting as the wind, the poison they scatter is, at the worst, confined to the narrow circle of a few hearers. They are frequently the effect of a sudden transport, easily misunderstood, and often misreported."—*Holt, C. J.*, 3 Salk. 225; *Foster, Cr. L.* In one case the plaintiff wrote of a peer, that he "under the cloak of religious reform hypocritically, and with the grossest impurity, dealt out malice and falsehoods." Though if spoken those words would not be actionable, yet when written they were held to be so. —*Thorley v Kerry*, 4 Taunt. 364.

then they will be as much actionable as if they had been written, and the effect will be the same. Another distinction is, that though in case of public libels an indictment lies when spoken words are blasphemous seditious or treasonable, including in the latter category such as amount to contempt of court or Parliament,¹ yet when spoken words are defamatory only of personal character, they are not indictable, it being conceived that an action for the damage done is remedy sufficient, whereas if the words be written or printed, there is a criminal remedy also either by information or indictment. In all other respects slander and libel are practically one and the same cause of action.

Distinction between slandering and scolding.—Another distinction may here be noticed arising out of the last. To slander an individual is to make a definite attack upon reputation in such a way that some legal remedy is available by action at the suit of the individual injured. But where no such definite attack can be discerned at any one point, and yet abuse upon abuse is heaped on a person, which neither singly nor collectively amount to an actionable wrong, this is called more properly railing or scolding than slandering. It is a species of indeterminate slander carried on with mechanical vehemence, and explodes in the air with sound and fury, rather than causes any appreciable injury to the individual aimed at. And yet this noise, which constantly threatens and only sometimes reaches the point of slander, is deemed by the law a nuisance, and so punishable in another form. Scolding is an indictable offence.² It is peculiarly a female's offence, and the common law punishment was ducking, or, as Coke explained, the female was put in a cucking-stool and soused in water.³ In one case in 1705 the scold after conviction wanted to argue her writ of error in person, and Holt, C. J., gave her time to do so, for he added, that "perhaps ducking would rather harden than cure her, and if she were once ducked she would scold on all the days of her life."⁴ She afterwards succeeded in setting aside the judgment on the ground, that she had been called *rix*a and not *rix*atrix, that is to say, she had been called, in bad

¹ R. v Langley, Cas. t. Holt, 654. ² R. v Foxby, 6 Mod. 145 ;
¹ T. R. 748. ³ 3 Inst. 219. ⁴ 6 Mod. 213.

Latin, the wrong word for female.¹ The indictment soon afterwards was expressed in English, and the same error was thus not likely again to occur.² Another flaw in that indictment was said to be, that it ought to have been alleged, that her scolding was a common nuisance to the neighbours, for "that all scolding was not indictable, but only such as was intolerable to neighbours." Scolding of this last kind is thus indictable as a nuisance, but not actionable like a slander.³

Threat to publish a libel.—In the exercise of freedom of speech, not only is a libel published, but sometimes the tendency stops short at the preliminary threat. This is often a mere form of speech, and amounts to nothing which courts can take notice of, for the law usually deals only with the overt acts, and with accomplished facts. Though therefore an intention or even threat to publish some libel is not punishable, yet in one form it is so, namely, where the object is to extort money or some equivalent. This was expressly declared in 1843 to be a criminal offence, being equivalent to a threat of violence to the person, or an attempt to break the peace. Accordingly, whoever threatens to publish or proposes to abstain from publishing something touching a person, with intent to extort money or valuable thing from such person, or with intent to procure some appointment or office of trust, commits a misdemeanour.⁴ In order to commit this offence, it is not necessary that the thing to be or not to be published should be actually defamatory. It may be something indifferent. It is enough that it have such an effect on the mind of the person as to induce money to be paid, or an office given.

* *Libel viewed as constructive breach of peace.*—Another peculiarity which once distinguished libel was, that it was said to be punishable by a criminal remedy, because

¹ 6 Mod. 239.

² L. Raym. 1094.

³ A historian relates, that a scold was soused in the Thames by sentence of some court in 1745, from Kingston Bridge, in presence of 2,000 people.—1 *Lyson's Environs of Lond.* 233. The offence remains, and this form of punishment has not been expressly repealed; yet future scolds will probably satisfy any court, that the cucking-stool is now illegal for various reasons.

⁴ 6 & 7 Vic. c. 96, § 4. Imprisonment for three years with hard labour.

it tended to provoke a breach of the peace, and it was on this ground, that for a long time the courts so liberally and indiscriminately allowed, and indeed compelled, a libeller to enter into recognisances to keep the peace.¹ And apparently the same assumption will be seen to have led the judges, before Fox's Act corrected it, into the anomaly of holding the guilt of libel an inference of law and not of fact. This mode of viewing libel was founded on the assumption, that libels were more than other wrongs, or indeed more than many breaches of contract, equivalent to a breach of the peace. In a rude state of society all things that are now illegal acts and give rise to actions more or less tempted to a breach of the peace. The man who could not get his money from an evasive debtor would strike a blow as readily and with as much propriety as he who had been accused of theft would strike his accuser. This notion, that the tendency of a libel to cause a breach of the peace is greater than the tendency of other wrongful acts, or even of a spoken slander, is obviously founded on misapprehension, and is no longer tenable.²

How far malice is an ingredient in libels.—The word malice is constantly resorted to in dealing with libels. As in the crime of murder malice is said to be an essential ingredient, and must be inferred from the circumstances and the conduct of the accused, so it is said, in the wrong of libel, malice is deemed an ingredient, and even in the face of facts which tend to prove an honest belief in the truth of what is stated, the law will imply this malicious ingredient from the nature of the wrong actually done. In short, as libels consist of words, and words have certain definite meanings known and read of all men, it is not so much what the person who used the words did in the secrecy of his own mind intend, as what those words when told to third parties will naturally mean, that the essence of the wrong consists. Certain reports will ruin a third person's character equally, whether used with the purest and almost benevolent wishes, or the most malicious and revengeful intentions. But in spite of the absence of any intention to injure, if words be used which in their natural meaning are libellous, and are damaging to private

¹ See 1 Pat. Com. (Pers.) 191.

² See further as to this, *post*, "Remedy by Indictment."

reputation, then the malice will be implied; for it is the business of all men so to act and so to speak, that the character and reputation of others, and which are the same as property, and a valuable possession, should not be wantonly, carelessly, or even inadvertently assailed. When the libel is uttered, not in the course of any honest and lawful business, which it will be seen the law protects, but without adequate cause or ground of self-defence, and by the person going as it were out of his way to say it, then malice is necessarily implied, and the cause of action is sufficiently established. Thus it may be said, that libel in fact is libel in law, whatever be the motive avowed or concealed, for the damage to the plaintiff is the real cause of action.¹ And so entirely is it irrelevant in the ordinary action for libel, what was the motive or intention of the defendant, that a judge who told a jury to consider, whether the defendant intended to injure the plaintiff, was held to have misdirected them, it being necessarily presumed, that every man intends the natural and ordinary consequences of his own act; and if a third party is injured, it cannot matter to him, whether malice existed in the wrongdoer or not.²

The inquiry into the existence of malice is only material, or rather is a short mode of expression in those somewhat

¹ *Bromage v Prosser*, 4 B. & C. 255. "Malice, in its legal acceptance, means not personal spite, but conscious violation of the law, taken along with the maxim, that every one must be taken to intend the necessary consequence of his deliberate acts."—*L. Campbell, Ferguson v Kinnoul*, 9 Cl. & F. 321.

"Everything written or printed which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been."—*Parke, B., O'Brien v Clement*, 15 M. & W. 437.

"An act unlawful in itself and injurious to another is considered, both in law and reason, to be done *malo animo* toward the person injured, and this is all that is meant by a charge of malice in a declaration, which is introduced rather to exclude the supposition that the publication may have been made on some innocent occasion than for any other purpose."—*Duncan v Thwaites*, 3 B. & C. 556.

LORD MANSFIELD told a jury that it was not necessary to prove an actual intent, which is the private operation of a man's mind, but they were to exercise their judgment from the nature of the act as to the intent with which it was done.—*R. v Tooke*, 20 St. Tr. 762.

² *Haire v Wilson*, 9 B. & C. 643; *Fisher v Clement*, 10 B. & C. 472.

ambiguous cases where the person uttering the libel was honestly acting in self-defence or in furtherance or protection of his lawful rights, and these two rights clash—the right of the libelled person to have his character and reputation intact, and the right of the libeller to speak his mind if he is thereby pursuing his lawful business in the way which he thinks best fitted to promote his own interest. This class of cases are often indiscriminately classed under the head of privileged communications, though they would more properly, following by analogy the distinctions in manslaughter, be called excusable libels.

Construction of the libel or slander.—Another important matter with regard to all libels and slanders is the construction to be given to the words. The rule is, that it is for the jury to consider, whether injury to character is the necessary consequence of the whole libel taken as one document. They are to construe the libel for this purpose, and to see, whether the effect of one part is not neutralised by another part; for if so, the bane and antidote must be taken together, and the result may be no libel at all.¹ Or as Coke said, a man's words are not to be taken by parcels.² When the libellous words are ambiguous, as they often are, it was once thought to be the duty of courts to construe them in the most favourable sense to the person using them. But that view has long been repudiated, and now there is only one just way of construing language, whether libellous or not libellous, namely, in the sense which it naturally bears; in other words, in the sense which the majority of people hearing or reading the language would attribute to it.³ As Lord Mansfield, C. J., said, "Where words from their general import appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them

¹ Chalmers v Payne, 2 C. M. & R. 156. ² 4 Rep. 18.

³ Harrison v Thornborough, 10 Mod. 197; Roberts v Camden, 9 East, 96; Hawkinson v Bilby, 16 M. & W. 442. LORD HARDWICKE said, that in earlier times judges used their utmost endeavour to explain away opprobrious words, but that this was wrong, for the characters of men had the same claim on the protection of the law as their estates, and the sole question was, in each case, what the words meant.—Carpenter v Tarrant, *Cas. t. Hardw.* 339.

different from what they bear in the common acceptation and meaning of them.”¹

The medium of the libellous act.—The medium by which the libellous act is committed is not confined to any one description of writing, printing, painting, gesture, or pantomime; all depends on the effect produced by the instrument or medium used on the public or the bystanders. The language may be ironical or metaphorical;² as, for example, to call one “an honest lawyer.”³ Hence it is idle to set up as a defence that the words were misspelled;⁴ or were in the form of a question put to third parties;⁵ or that the defendants were only singing a song in front of a father’s house (imputing dishonesty and immorality to two of his children);⁶ or that no individual was named, though a class was described (under which that individual was understood by everybody to be included), such as “some of the Irish factories”;⁷ or that the initial letter only was printed;⁸ or that it was only a fancy picture of “Beauty and the Beast” (though the figures resembled a well-known man of fashion and his wife).⁹ And the libellous act may consist in mere gestures or conduct; as fixing a gallows before a man’s door or somewhere near, which Coke said was an example of libel by signs.¹⁰ Holt, C. J., held that painting a man playing at cudgels with his wife was a libel;¹¹ and so was putting up and burning a certain lamp at another’s door, like that commonly used before disorderly houses;¹²

¹ Peake *v* Oldham, Cowp. 275.

² Hob. 215; 11 Mod. 86;

Hoare *v* Silverlock, 12 Q. B. 624; Fisher *v* Clement, 10 B. & C. 472.

³ Boydell *v* Jones, 4 M. & W. 446.

⁴ R. *v* Edgar, 2 Sess. C. 29.

⁵ Gathercole’s Case, 2 Lew. C. C. 255.

⁶ R. *v* Benfield, 2 Burr.

984.

⁷ Le Fanu *v* Malcolmson, 1 H. L. C. 664.

⁸ Read *v*

Huggonson, 2 Atk. 470.

⁹ Du Bost *v* Beresford, 2 Camp., 511. In one case Parson Prick in his sermon told a story out of Foxe’s *Martyrology*, that one Greenwood, a justice and great persecutor, had great plagues inflicted on him and was killed, by the hand of God. But it turned out that Greenwood was present listening to the sermon, and sued for damages. WRAY, C. J., however, told the jury, it was only delivered as a story with no intention to injure, and judgment was entered for defendant; and POPHAM said it was good law, and COKE also quoted the case as sound sense.—*Cro. Jas.*, 91.

¹⁰ 5 Rep. 125.

¹¹ 11 Mod. 99.

11 East, 226.

¹² Jeffries *v* Duncombe,

also carrying a man about dressed with horns and bowing at plaintiff's door.¹

Libelling classes of persons, corporations, and firms.

—Holt, C. J., said that a libel that points at nobody is like a shot at random, that seldom does any mischief.² A defamatory libel is necessarily personal, yet it may be aimed ostensibly at individuals united in partnership, or described under the more general name of a class of persons. It is true that some descriptions are too wide to amount to libel, as where "men of the gown" are abused.³ But it is libellous to describe persons spoken of, though no more definitely than as partners of a firm;⁴ or a society which manages a nunnery.⁵ A chairman of a life assurance company was held entitled to sue on behalf of the shareholders of the company for a libel importing that their policies were insecure.⁶ And a shareholder in a company is not so identified with his fellow-shareholders, that he may not be sued for libelling the company to which they both belong.⁷ And on the other hand the managers of a company or voluntary society may so act as to make the company or society liable for libels issued under their authority, as where a telegraph company publish a telegram that a bank has stopped payment.⁸ The court on one occasion granted a criminal information for a libel on "the clergy residing in and near the city of Durham," and the verdict of guilty was in the same terms; though the point was raised afterwards, but never decided, whether this was not too vague and general a description of the persons libelled.⁹ And in a case where the libel was on "the Portuguese Jews," accusing them of burning a bastard child, the court granted a rule for a criminal information.¹⁰ And in a

¹ *Bolton v Deane*, 2 Show., 314. But riding Skimmington, a mode of insinuating that a man's wife had beaten him, and though injuring the plaintiff (a hackney coachman) in his business, was held not actionable.—*Mason v Jennings*, *T. Raym.*, 401. It was said that the Greeks had no punishment for defamation by words and gestures, for it was pusillanimity not to resent it on the spot.—*Hobbes' Leviath.*, c. 27. See *Diog. Laert. Anach.*

² *R. v Tutchin* 14 St. Tr. 1118.

³ *Shower*, 314; 3 Salk. 224.

⁴ *Haythorn v Lawson*, 3 C. & P. 196; *Le Fanu v Malcolmson*, 1 H. L. C. 637. ⁵ *R. v Gathercole*, 2 Lewin, C. 237. ⁶ *Williams v Beaumont*, 10 Bing. 260. ⁷ *Metropolitan Co. v Hawkins*, 4 H. & N. 87. ⁸ *Whitfield v S. E. R. Co.*, E. B. & E. 115. ⁹ *Brougham's Speeches*. ¹⁰ *Osborne*, 2 Barn. 138.

case where the management of "some of the Irish factories" was attacked as "practising great cruelties," the owner of one of these was held entitled to sue as being included in those aimed at.¹ So where a newspaper article charged libellous acts specially against, but without naming "an aide-de-camp of the governor of a colony," and there were eight of them, it was held, that the libel affected each and all those eight.²

On the other hand, if the jury are satisfied, that the imputations were impersonal, and were aimed rather at a general source of mischief, the plaintiff will fail; as where a person declared the tanks for supplying water to ships at St. Helena contained water unfit to drink, and an owner of a ship trading to that place was held to be not involved personally, and not entitled to sue.³ And where a newspaper writer, writing about an archæological meeting, cautioned all antiquaries against the figures sold as "pilgrim's signs," which were said to be of recent publication and a gross attempt at extortion—but not mentioning any names—the plaintiff, who dealt in such articles, was held not to be entitled to sue, for nothing was pointed at him specially.⁴

Libels on the dead.—The injury to character or reputation contained in a defamatory libel, necessarily means an injury to the reputation of a living person, who is in a position to suffer and to vindicate his claim to redress by action or indictment; for if there is nobody to claim redress, then no injury can be done, and no rights and no wrongs can exist. History is said to swarm with libels on the dead and the living. Nevertheless, that expression is sometimes used in the law as if the same kind of injury were possible towards the dead as towards the living, and as if the former were not yet beyond the reach of detraction and could still cry aloud for redress. This was never more than a figure of speech indicating that sometimes the relatives of a person recently dead were treated as identified with their predecessor, and as if the inanimate clay could be deemed on such occasions to glow with anger, pride, or revenge.⁵ By the Roman law the heir was bound

¹ *Lé Fanu v Malcolmson*, 1 H. L. C. 637.

² *R. v Hatchard*,

32 St. Tr. 752. ³ *Solomon v Lawson*, 8 Q. B. 823.

⁴ *Eastwood v Holmes*, 1 F. & F. 347.

⁵ The ancient Egyptians surpassed all nations in the liberal manner

to protect the good name of the deceased, and any insult offered to the dead body was deemed offered to himself, and a good cause of action.¹ Hence, when a father's statue was struck with a stone, this was an injury to the son and heir, and could be redressed by action.² Our law has never gone so far as to give damages, and yet there are traces of the same right and the same wrong. The ancient notion seemed to be, that such libels were so irritating to the surviving family, that they stirred them to a breach of the peace, and so there was a good ground for indictment at common law. Coke several times repeats it as if he had discovered an excellent reason for punishing libels on dead magistrates; this reason was, that these were "reflections on the Government, and the Government never dies."³ And he says, that the Star Chamber punished such an offence, as, for example, the case of the dead Archbishop Whitgift being slandered.⁴ In one case, in 1791, a newspaper writer published a notice of the recent death of Earl Cowper, adding that he had been addicted to unmanly vices and debaucheries; and though on trial of an indictment the jury found the defendant guilty, still judgment was arrested because it had not been alleged, that the libel tended to stir up the family of the deceased to a breach of the peace. As L. Kenyon, C. J., remarked, it was preposterous to hold, that at no time can the conduct of a dead man be canvassed, or the conduct of bad men contrasted with that of good men. Therefore, the tendency to provoke a breach

in which they disposed of this difficulty; for after the death of a person, a tribunal of forty judges sat in solemn inquest to try his character for good and evil, and cast up the balance. If upon the whole the accusations were not proved, then his body was allowed to be buried; but if the verdict was against him the corpse was refused burial, and was kept as a chattel, remaining in the house of his descendants till the judgment could be reversed.—*Diod.* i. 92; *Herod.* b. ii.; 1 *Kenrick's Egypt*, 500; 2 *Ibid.* 59. Solon was thought to make a just law, that no man should be allowed to speak ill of the dead.—*Plut. Sol.*

¹ Dig. 47, 10, 27; Gaius, Inst. iii. § 221.

² Dig. 47, 10, 27.

³ *Wraynham's Case*, 2 St. Tr. 1076.

⁴ 2 St. Tr. 1074. The Star Chamber's view of this matter was put thus: "As a scandal to him that is dead in the public service, it hath been adjudged, that words of imputation against a great judge after his death should not be examined, lest the public justice might receive prejudice when he is gone, that should make it appear to be

of the peace was an essential ingredient of this offence.¹ In another case about the same time a Knight of the Bath had died, and the newspaper said of him, that he "had changed his principles for a red ribbon, and voted for that pernicious project, the excise, and had acted corruptly." It was alleged in the criminal information, and the court allowed it, that all this was said, in order to stir up the hatred of the subjects against the family of the deceased.²

The law therefore may still be said to treat it as an indictable offence to write of the dead what will stir the living descendants to a breach of the peace. But the court would no doubt confine the remedy to descendants, and would require to see, that the words are such that no person of reasonable sense and firmness could well restrain himself in the circumstances—conditions not usually easy of fulfilment in modern times, when ample means of vindication and defence exist by publication or otherwise.³

What kind of publication necessary for slander and libel.—The essence of slander and libel consists in this, that the character of one person is injured in the estimation of some third person other than the slanderer, and hence the presence of a third person or some communication to a third person is essential to the offence. If two persons sit in private, and one uses towards the other the strongest of language, there is no legal wrong done, and the person wronged is at most angered, and yet his reputation in his own eye is left without a stain, because it is still in his own keeping. It is only when some third person is introduced, who is capable of acting on the slander and communicating his feeling to others,

false and scandalous, which was the judges' opinion in Stroud's case."—*Hudson's Star Ch. c. 11.*

¹ R. v Topham, 4 T. R. 129. ² Ibid.

³ As to excuses for breach of the peace generally, see 1 Pat. Com. (Pers.) 189. A like danger which beset the dead from the perils of biographers and publishers induced Parliament to take some step in self-defence. In 7 Geo. I. the House of Lords, on the occasion of Curll advertising a life of the Duke of Buckingham, went the length of making an order that it was a breach of privilege to write the life of a deceased peer.—82 *Parl. Deb.* (3) 446, 1134. This order of the House was in full force till Lord Campbell, C. J., with an eye to his own protection, prevailed on the House to rescind it. Curll the publisher, by his unscrupulous and hasty biographies of illustrious men, was said by Arbuthnot to add a new terror to death.

that the origin of the action or of the crime begins. And there is no material difference in this case between spoken and written or printed words, for both must reach a third person. If it were held otherwise, a man would be punished for his thoughts, and not for his overt acts. The law however cares nothing for the secrets of the mind, so long as they bear no outward fruit in the conduct. Much therefore depends on what is the kind of publication used in each case.¹ It is true that the publication required in a letter which provokes a breach of the peace is sufficient, if the letter is sent to the party intended, though nobody else knew of it.² The reason in that case has been suggested to be, that the person becomes so uneasy, that he cannot help showing it to others, and so it becomes published in effect. But the great majority of libels have little to do with provoking a breach of the peace, any more than other illegal acts. A common mode of circulating libels in the time of Henry VIII., before printing became a settled occupation, was to scatter the written or printed leaves amid crowds and processions on public occasions.³ And Coke says the duty of persons who found these things was to deliver them to the magistrate.⁴ When therefore a libel about A is sent direct to A alone, it is not published, and so is not actionable.⁵ Yet if the libellous letter, though addressed to A, would in ordinary course be opened by A's clerk or servant, and if it is so opened, and this practice was known to L, the libeller who sent it, this is some evidence of publication by L.⁶ And if a libel is sent to A's wife about A, this is also a sufficient publication, for a third party has been reached.⁷

Whether publication is per se the crime of libel.—It was laid down by the Star Chamber, that every one

¹ "The noble, dignified, and humane policy of the law soars above the little irregularities of our lives, and disdains to enter our closets without a warrant founded upon complaint. Constructed by man to regulate human infirmities, and not by God to guard the purity of angels, it leaves to us our thoughts, our opinions, and our conversations, and punishes only overt acts of contempt and disobedience to her authority."—*Ersk. Speeches*.

² *R. v Wegener*, 2 Stark. 245. ³ *Darcy v Markham*, Hob. 120 Cro. Ch. 121. ⁴ *Haliwood's Case*, 5 Co. 125. ⁵ *Phillips v Jansen*, 1 Esp. 625. ⁶ *Delacroix v Thevenot*, 2 Stark. 63. ⁷ *Wenman v Ash*, 13 C. B. 842.

who shall be convicted ought to be a contriver of the libel, or a procurer of the contriving of it, or a malicious publisher of it, knowing it to be a libel. If he writes a copy of it and does not publish it to others, or if he hears, or reads, or laughs, at it, this is said by Coke to be no publication of it.¹ Holt, C. J., seemed to go the length of holding, that the mere committing of libellous words to writing was *per se* the offence, and hence he held, that if a jury found the fact of writing or even copying libellous words, this was equivalent to a verdict of guilty.² Thus the judge said, "The mere having of such writings in his custody is highly criminal, for notwithstanding he might design to keep them private, they might after his death fall into such hands as might be injurious to Government." And hence the collecting and transcribing of libels for the purpose of publishing them was deemed criminal, though no publication should ever take place, since men ought not to have such evil instruments in their keeping. In one case it was proved, that the defendant, a clergyman, wrote down a libel against King William and Mary, while a person unknown dictated the words to him, and so the clergyman acted only as penman. And the court decided, that this differed from the case of an amanuensis—that the real author did not make the libel, because he did not write it; and that unless this clergyman could be punished, then nobody could. So the clergyman was held guilty of writing and publishing.³ In 1792, when the judges' opinions were asked at the time of Fox's Bill being considered, ten judges treated the crime as practically consisting in the mechanical act of publication of the libel. And on the point being again solemnly argued in Sir F. Burdett's case in 1820, the court held an intermediate opinion, namely, that when a man puts his libellous letter into the post, this is equivalent to publication, for it is the first and irreversible step of the mechanical process.⁴

Mode of proving publication of libel.—While more

¹ Lamb's case, 9 Co., 59 b. Hudson differs from Coke, and says the Star Chamber used to hold it settled, that to hear a libel sung or read, and to laugh at it and make merriment with it, was a publication in law.—*Hudson's Star Ch.*, c. 11.

² *R. v Beare*, 12 Mod. 221; 2 Salk. 419; 1 L. Raym. 414. ³ *R. v Paine*, Carth. 405. ⁴ *R. v Burdett*, 4 B. & Ald. 95.

than mere authorship is necessary in order to prove publication, and while the libel is still in the desk of the writer, it is not published, yet cases have occurred where something is deemed equivalent to delivery by the author to a third party. Thus proof that a libel has been published by B, and that in B's house a manuscript in L's handwriting is found nearly identical with the published copy, is admissible evidence that L published it.¹ And the mode of proving handwriting in these cases does not differ from that in other cases.² But it is no *primâ facie* evidence of publication that B, having a printed copy, on request shows such copy of the libel to another.³ Nor is it any evidence of publication by B that the libel is in the handwriting of B's clerk or amanuensis.⁴

Liability of bookseller and shopkeeper for libels sold.—The bookseller is a publisher as well as the author and printer. With regard to selling a libellous book or paper, if in the ordinary course of business any servant sells it in a shop, this is deemed an act of publication by him who keeps the shop, whether he knew anything personally about the subject matter or not, unless he can prove that he expressly ordered the contrary, or that there was some trick or collusion against him.⁵ Erskine urged, in such a case, that if without the knowledge of the shopkeeper his servant sold a copy, the shopkeeper could at

¹ Tarpley v Blabey, 2 Bing. N. C. 437; R. v Lovett, 9 C. & P. 463.

² Where the only evidence that the defendant J. S. was the publisher of a newspaper was, that some one bought a copy in the office, and that his name was in the footnote at the end described as that of publisher, this was held no legal evidence of J. S. having published it.—R. v Stanger, L. R., 62 B., 352.

³ Smith v Wood, 3 Camp. 323.

⁴ Harding v Greening, 1 Moore, 479. Nothing could surpass the skill with which the Star Chamber obtained evidence of the authorship of a libel. HUDSON says that "In a case, 7 Hen. VIII., for the discovery of the handwriting of a libel, the books of all the tradesmen in London were to be viewed with two aldermen and a knight appointed by the Privy Council, to confer the hands and manner of writings at the Guildhall, whither they were to be brought, sealed for that purpose only. This was done for the discovery of the author."—Hudson's Star Ch., c. 11.

⁵ R. v Tutchin, 14 St. Tr. 1112; R. v Almon, 20 St. Tr. 838. And see 16 Parl. Hist. 1156.

most be guilty only of negligence, and ought not to be deemed guilty of maliciously publishing. And he referred to the analogous case of homicide, being murder or manslaughter according to the circumstances. But Lord Kenyon, C. J., said there was ample evidence of publication, and therefore of malice.¹ Erskine urged in vain, that this was an exception to the general rule, that there is no criminal liability for the act of a servant without some participation of the master. At one time the mere fact of publishing a seditious libel, or even mechanically printing it, as a compositor does in the service of a master printer, without being cognisant of the libel, was indiscriminately held a criminal offence, irrespective altogether of the question of intention in the printer.² And though counsel urged, that if this were so, then the postboy who carried the bag of letters would be equally liable, the judge said the case of the postboy must be considered when it arose, but the compositor was liable. At a later date it was conceded, that, though no trick had been shown, there may be such a thing as an unintentional or inadvertent publication in some cases, however much the law leans against any such lenient inference.³ And it was still later allowed, that a porter from a coach office, who merely carries a parcel of libels, of the contents of which he knew nothing, might escape the guilt, if a jury on the evidence thought he knew nothing about them.⁴ And the judges, in 1820, were satisfied, that the boy who carries a letter to the post is not the person who publishes, but only the person who sent the boy and gave it to him.⁵

Liability of proprietor of newspaper for libel therein.—Again, Lord Kenyon, C. J., said the proprietor of a newspaper was answerable criminally as well as civilly for the acts or misconduct of his servants or agents in conducting such newspaper. That, he said, was the opinion of Lord Hale, Powell, J., and Foster, J., and all the high authorities had acted on it for a century.⁶ And when the

¹ R. v Cuthell, 27 St. Tr. 662; 6 Camp. L. Ch. 518.

² R. v

Clerk, 1 Barn. 304; R. v Nutt, Ibid. 306; Fitz. 47.

³ R. v

Topham, 4 T. R. 127.

⁴ Day v Bream, 2 M. & Rob. 55.

⁵ Best,

J., R. v Burdett, 4 B. & Ald. 126.

⁶ R. v Walter, 3 Esp. 21. LORD TENTERDEN, C. J., defended this doctrine thus: "This was not a different principle from that which

libel is published in a newspaper, the sale of every copy of the paper is deemed a fresh publication and a fresh cause of action.¹ And though the party libelled sent an agent to the newspaper office to buy a copy and it was bought, this was deemed a publication, for, as far as regarded the libeller, the injurious act was complete on delivery to such agent.² Any person who sends the newspaper to a third party is also a person who publishes it.³ Indeed one judge said, that "not only the party who originally prints, but every party who utters, sells, gives, or lends a copy of an offensive publication is liable to be prosecuted as a publisher."⁴

Publishers and sellers of defamatory libels may, in some cases, escape liability.—The harshness of this rule of the law by which indiscriminate liability is imputed to the nominal publisher, or printer, or bookseller, whether he personally knew anything of the contents of the paper sold or printed, has been modified in criminal prosecutions by the Statute of 1843. Whenever on a trial of an indictment or information a presumptive case against the defendant is made out owing to a publication through another person by his authority, the defendant may prove, that such publication was made without his authority, consent, or knowledge, and not from any want of due care or caution on his part.⁵ And therefore where a proprietor of a newspaper took charge only of one department, but left the editing to a paid editor, who inserted a libel when such proprietor was absent and knew nothing of the matter, it was held, that the latter was

prevails in all other criminal cases. The rule is conformable to principle and to common sense. Surely a person who derives profit from and who furnishes means for carrying on the concern and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears; and he ought to be answerable, although it cannot be shown, that he was individually concerned in the particular publication. It would be exceedingly dangerous to hold otherwise, for then an irresponsible person might be put forward, and the person really producing the publication, and without whom it could not be published, might remain behind and escape altogether."—*R. v Gutch*, 1 *M. & M.*, 437.

¹ *D. Brunswick v Harmer*, 14 Q. B. 189. ² *Ibid.* ³ *R. v Burdett*, 4 B. & Ald. 126. ⁴ *Bayley, J., R. v Carlile*, 3 B. & Ald 169. ⁵ 6 & 7 Vic. c. 96, § 7.

at liberty, under the statute, to prove this fact, and so escape liability by showing, that the libel was not inserted with his authority or knowledge, and that he had not been guilty of any want of due care or caution.¹ But the rule, as thus modified, exists only in criminal cases, and the law, as before stated, is unmodified in civil actions.

Liability of third party for causing libel to be published in a newspaper.—Third parties may also incur liability as well as the publisher. Thus where the defendant told to a reporter of a newspaper a story, which he said would make a good case for his newspaper, and the reporter published it in the newspaper much as it was told him, the relator was deemed the person who published the story, and so was liable for it if it was libellous.² It was said to be a good practical rule in such circumstances, that if one request another to write a libel for him, the former is answerable and must take his chance of the article being stronger than was contemplated.³ And in like manner if a person about to speak at a public or private meeting request the newspaper reporters to publish his speech, this will make the speaker liable for the published libel, though it be imperfectly condensed and made thereby worse against the party libelled.⁴ In such cases it is for a jury to say, whether the speaker merely expressed a hope that the speech would be published, or was more definite, and said what amounted to a request, and so directly authorised it to be published.⁵

¹ *R. v Holbrook*, 3 Q. B. D. 60.
157. ³ *R. v Cooper*, 8 Q. B. 533.

² *Adams v Kelly*, 1 Ry. & M.
⁴ *Parkes v Prescott*, L. R.

4 Exch. 169. ⁵ *Ibid.*

CHAPTER IX.

THE CHARACTERISTICS OF LIBEL AND OF EXCUSABLE LIBELS.

Contents of a slander or libel.—We now come to that part of the definition of a defamatory libel or slander which consists in its being “an attack upon another’s character.” The mode in which the libel operates on the character of the person libelled is illustrated under several heads or situations, according to the contents of the libel and the kind of imputation involved. It may mean, that the libelled person had committed some criminal act, or something not quite amounting to that, yet very near it; or it may mean, that the libelled person has done something which shows, that he is unfit to carry on some business which he professes. These different classes of libel require some explanation.

Libel or slander imputing a crime.—One of the most serious of all libels or slanders consists in imputing to another the actual commission of some crime or indictable offence, for this so unmistakably detracts from any man’s character and reputation, that to say, or write, or publish such imputation is a cause of action, whether or not the plaintiff has thereby suffered any loss or valuable consideration that can be estimated in money. And, as may be supposed, this imputation is seldom made in direct terms, but usually is to be implied out of some circuitous description more or less cogent. But whether it is express and direct, or circuitous and constructive, is merely a matter of evidence for courts and juries, and the result, however arrived at, is precisely the same. Such, for example, are the following imputations: Of robbing John White ;¹

¹ Rowcliffe v Edmonds, 7 M. & W. 12.

of bigamy;¹ of sending a threatening letter;² of receiving stolen goods knowingly;³ of swindling.⁴ To the same effect also are such imputations as that he murdered his first wife by giving her wrong drugs;⁵ he had done an act for which defendant could transport him;⁶ if he had his deserts he had been hanged before now;⁷ he was a returned convict (though the term of punishment was over);⁸ the Attorney-General had ordered him to be indicted for perjury.⁹ The words "I am convinced you are guilty of the death of Daniel Dolly, and rather than you should go without a hangman I will hang you," were held to mean the crime of murder.¹⁰ And to the like effect are the words, that the defendant would not trust the plaintiff with 5*l.* of his property;¹¹ that the plaintiff fraudulently took his horse out of the race list;¹² that one is sure to pay for it, if one dines and plays at cards with him;¹³ that the plaintiff is a libellous journalist.¹⁴

On the other hand the words sometimes do not amount to more than scurrility, and so are not actionable as imputing a definite crime; as that his house is as bad as a bawdy house;¹⁵ that the defendant (a physician) "made up the medicines wrong for the child through jealousy," a child having died, and the words not being spoken of an apothecary in his trade;¹⁶ that the plaintiff was foresworn, for this does not necessarily mean perjury;¹⁷ that the plaintiff was a thief, and his father before him;¹⁸ that "I have a suspicion that you and A robbed my house, and therefore I take you into custody."¹⁹ The word "thief" is often used as the climax of other opprobrious terms without seriously implying a charge of felony, but a jury should be called on to say how this is.²⁰ Twysden, J., said,

¹ *Heming v Power*, 10 M. & W. 570. ² *Harvey v French*, 1 Cr. & M. 11. ³ *Alfred v Farlow*, 8 Q. B. 854. ⁴ *Janson v Stuart*, 1 T. R. 748. ⁵ *Ford v Primrose*, 5 D. & R. 287. ⁶ *Curtis v Curtis*, 10 Bing. 477. ⁷ *Donne's case*, Cro. Eliz. 62. ⁸ *Fowler v Dowdney*, 2 M. & Rob. 119. ⁹ *Roberts v Camden*, 9 East, 93. ¹⁰ *Peake v Oldham*, Cowp. 275. ¹¹ *Cheese v Scales*, 10 M. & W. 488. ¹² *Greville v Chapman*, 5 Q. B. 731. ¹³ *Digby v Thomson*, 4 B. & Ad. 821. ¹⁴ *Wakley v Cooke*, 4 Ex. 518. ¹⁵ *Brayne v Cooper*, 5 M. & W. 249; see *Huckle v Reynolds*, 7 C. B., N. S. 114. ¹⁶ *Edsall v Russell*, 5 Scott, N. R. 801. ¹⁷ *Holt v Scholefield*, 6 T. R. 691. ¹⁸ *Thompson v Bernard*, 1 Camp. 47. ¹⁹ *Tozer v Mashford*, 6 Exch. 539. ²⁰ *Penfold v Westcote*, 2 N. R. 335.

there was once an action for defendant saying, that he heard A was hanged for stealing a horse, whereas it appeared the words were only spoken in sorrow for the news.¹

If the offence imputed is past and punished.—It has been usually said, that the reason why words imputing an indictable offence are actionable is, because, if true, they would render the person libelled liable to indictment, and that somebody hearing them might make a charge on them.² But this is a narrow view, and the better reason is, that it is the scandal and turpitude of mind that it implies, and which has the effect of depreciating the present character of the party. And hence it is equally actionable if the words impute an offence that is past and has been punished.³ All who have been convicted of felony and have suffered the punishment are now put by statute in the same position as if they had received a pardon from the Crown.⁴ And, as was well said, to call one a thief after a pardon is “neither necessary nor advanceth nor tends to justice.”⁵ Therefore in all such cases a slanderer must take care at all events to be within the truth. If he calls one who has been convicted of felony, and has suffered the punishment, a “convicted felon,” this may merely mean that he was once convicted, and if so, the defendant may, on proving the conviction, justify and escape a verdict in an action for damages against him. But if he call one “a felon editor,” this plainly implies, that the latter is a felon still, and at least is or was actually guilty of felony. And hence, in a plea to an action, justifying the truth of such an epithet, the defendant will be bound to prove not merely that the plaintiff was convicted and punished, but that he was actually guilty, and the record of conviction will be no evidence of the fact of guilt.⁶ And where a somewhat ambiguous name, such as “felon editor,” is used, it is for a jury to say, whether it means merely to impute, that the plaintiff was once convicted, or that he is still

¹ *Crauford v Middleton*, 1 Lev. 82. ² *Parke, B., Heming v Power*, 10 M. & W. 569. ³ *Gainford v Tuke*, Cro. Jas. 536;

Carpenter v Tarrant, Cas. Hardw. 339; *Beaver v Hides*, 2 Wils. 300; *Showell v Haman*, Cro. Jas. 153; *Boston v Tatham*, Cro. Jas. 622. ⁴ 9 Geo. IV. c. 32, § 3. ⁵ *Cuddington v Wilkins*, Hob. 82.

⁶ *Leyman v Latimer*, 3 Ex. D. 356; 2 Taylor, Evid. (7 ed.) 1416.

a felon, and if the latter, the justification must be proved accordingly.¹

Imputation of what was once an offence, but not now one.—As any criminal offence may be the subject matter of such libellous imputations, some regard is to be had in judging of the reported cases to those acts which were once crimes, but are no longer so, and *vice versâ*. Thus it was once held, that to impute to a spinster that she had had a bastard, when there was a statute called the Act of Fornication, was actionable *per se*: but no such statute now makes it any offence.² And the same may be said as to being a witch or sorcerer, for Gawdey, J., said “if he witcheth men so as they die, it is felony; and if he use witchcraft in any other manner, he shall stand upon the pillory; so in every respect it is a slander and a good cause of action.”³ All those fine distinctions are at an end. And so when one man said to another “The devil appears to thee every night in the likeness of a black horse, and thou conferrest with him,” this was clearly actionable in the time of Coke.⁴ But now these imputations are no longer actionable, and to call one a witch is only a flourish of humour. The words about bastardy, it is true, may sometimes be actionable still, in connection with the special circumstances of one’s profession or duty, as will be afterwards noticed.

Libel imputing impossible crime.—It was once treated as a nice question, whether an action lay for saying that A murdered B, when it was the fact that B was alive, and therefore the offence was impossible. But the court held, that no action lay for such an imputation, as where the defendant had said, “Thou hast murdered my wife,” she being alive.⁵ And at one time it was held not enough to sue for a libel such as, “Thou hast poisoned Smith,” unless it was also alleged, that Smith had died; yet, as Twisden, J.,

¹ Ibid. It is not unusual for railway companies to publish handbills, setting forth that a person was convicted for violating some bye-law, and generally overstating the offence, and they usually set up the defence, that the handbill was true, that is, that the party had been convicted of such offence. This has been held a good defence in an action, where the libel was substantially though not literally true.—*Alexander v N. E. R. Co.*, 6 B. & S., 340; *Biggs v G. E. R. Co.*, 18 L. T., N. S., 482; *Gwyn v S. E. R. Co.*, *Ibid.* 738.

² Anon. 2 Sid. 21. ³ *Rogers v Gravatt*, Cro. Eliz. 571. ⁴ Hob. 159, 172. ⁵ *Snag v Gee*, 4 Rep. 16.

said, the later opinions had been, that it was not necessary to allege the death, for that would be understood.¹

Imputation of an attempt to commit crime.—But where the imputation was, not that a crime had been committed, but that an attempt had been made to commit one, this was held actionable, as to say, “He lay in wait to rob Smith the goldsmith;”² or that he sent a letter wishing A to poison A’s wife;³ or that he persuaded A to rob his master;⁴ or that he persuaded a woman to kill her child because it was somebody’s bastard.⁵ And this is only in accordance with the general rule, for an attempt to commit a crime is indictable as much as the actual commission of the crime itself.

Words not clearly imputing definite crime.—There is thus no difficulty in applying this rule where the words defamatory are precise, and definitely point out the crime imputed. But when the words are somewhat ambiguous, or are accompanied with some comment or context which qualify their generality, it then becomes important to ascertain, whether the effect of the whole language is to impute a crime or only some conduct approaching but not reaching a definite crime. It is here that the distinction between words and writing or print comes into play, for in these somewhat loose imputations of things nearly approaching crime the words, if written or printed, will be actionable, though if only spoken they will not be so, unless accompanied with special damage. And the reason why writing made all the difference in such cases was, as already explained, nothing but this, that written words endure, and are capable of reaching great numbers of readers; while spoken words have but a transient and limited audience. The only clue to a test as to actionable words given by Holt, C. J., was, what he said was also Hale and Twisden’s test, namely, that the words “sound to the disreputation of the person of whom they were spoken.”⁶ And this is but a vague description, and indeed is only a use of one word for another. The distinction can only be learned from a variety of examples. Thus it is libellous to publish in writing, though not so in spoken words, that the plaintiff

¹ Phillips v Kingston, 1 Vent. 117. ² Cro. Ch. 140. ³ Cro. Eliz. 747. ⁴ Ibid. 710. ⁵ Cro. Eliz. 49. ⁶ Button v Heywood, 8 Mod. 24.

under the cloak of religious reform, hypocritically and with grossest impurity dealt out his malice and falsehoods;¹ that he had preferred unworthy claims upon a charitable society and squandered its money;² that the defendant, claiming a debt from A, who denied it, wrote that A attempted to defraud him.³ In one case where words were written of a man, that he had grossly misconducted himself and insulted two females, this was held actionable because it was said to be calculated to bring the defendant into contempt by some and hatred by others.⁴ Where F was a candidate for Parliament and published that C was most ungrateful in what he had said of F, for F had once advanced to C money when he was in great straits, this was held actionable as regards the publisher, for it imputed all but insolvency.⁵

Libel in calling scurrilous names.—Sometimes, the words being ambiguous, no clear imputation of a crime can be fairly inferred, as by the use of such epithets as scoundrel, rascal, rogue, cheat, swindler, or blackleg; nevertheless if special damage result, this will make a good cause of action for slander, and if they are written or in print no special damage need be alleged to support the action.⁶ Thus the following words (when not uttered with special reference to trades or business) have been held to be not *per se* actionable; rogue who cheated and robbed his brother-in-law;⁷ young woman who gets her living by prostitution;⁸ woman who was all but seduced by a notorious libertine;⁹ he or she has committed adultery.¹⁰ Where words of this vague kind are used, an attempt is often made to give a construction imputing crime, owing to some special circumstances in the plaintiff's case, or some peculiar profession or business. In such ambiguous cases evidence is admissible to enable a jury to decide, what was the precise meaning of the words used.¹¹ Thus to call a lawyer a daffidowndilly

¹ Thorley v Kerry, 4 Taunt. 355. ² Hoare v Silverlock, 12 Q. B. 624. ³ Tuson v Evans, 12 A. & E. 733. ⁴ Clement v

Chivis, 9 B. & C. 172. ⁵ Cox v Lee, L. R. 4 Exch. 284.

⁶ Barnett v Allen 3 H. & N. 376; Saville v Jardine, 2 H. Bl. 531.

⁷ Hopwood v Thorn, 8 C. B. 313. ⁸ Wilby v Elston, 8 C. B. 142.

⁹ Lynch v Knight, 9 H. L. C. 593. ¹⁰ Wilby v Elston, 8 C. B.

142; Ayre v Craven, 2 A & E. 7. ¹¹ Daines v Hartley, 3 Exch. 200; Hawkinson v Bilby, 16 M. & W. 442.

was once held actionable, because that was said to imply that he was ambidexterous.¹ So it was to call a game-keeper, whose vocation is to preserve foxes, the person who trapped the foxes.² To say in spoken words of a member of Parliament "that he never keeps his word except where his own interest is concerned," might be actionable without alleging any special damage; but to say of him, "as to instructing our member to obtain redress, we might as well instruct the winds, and should he promise us his assistance I should not expect him to give it to us," was clearly not actionable.³ Where a newspaper writer published, that a young nobleman by furious driving caused the death of a lady, and that he, on the very evening of the catastrophe, attended a public ball, this was held libellous because it was printed.⁴ But where a public advertisement stated, that A's connection with a certain establishment had ceased, and he was no longer authorised to receive subscriptions on its behalf, this was held to be not capable of any defamatory sense, being merely a business advertisement.⁵

Libel exposing to hatred and contempt and ridicule.

—Again, some words, when written, are said to be libellous whenever they expose one to hatred or contempt, or rather to ridicule. Many libels, however, have neither of these ingredients. The injury that is done by ridicule is too subtle for the law to redress; and it is so wholesome and just a style of treatment for a great variety of people, that society would be unendurable if the law were so severe in repressing it as is often currently asserted. The world abounds with characters so constantly hovering on the confines of actionable injury to others, yet so careful to avoid the technical conditions which would enable legal redress to be obtained, that if the aid of ridicule and contempt and hatred were not available, much more mischief than is now done would overwhelm many innocent and helpless persons who suffer wrong. Ridicule, wit, and every form of satire form the natural armoury by which these odious characters are most effectively assailed, and by which alone virtue and innocence can sometimes be

¹ Roll. Abr. 35.

² Foulger v Newcomb, L. R. 2 Exch. 327.

³ Onslow v Horne, 3 Wils. 177.

⁴ Churchill v Hunt, 1 Chitt. R.

480. ⁵ Mulligan v Cole, L. R. 10 Q. B. 549.

protected. They are also the natural scourge of incompetence and folly in persons of station and high office. The law, therefore, which is adapted only to restrain the coarsest minds, has no occasion to check the use of these delicate weapons. And many vague and inconclusive precedents, chiefly of ancient date, founded on the changing manners of the time, are now little regarded, seeing that the courts of the present day are more just and capable of weighing the reasons of the law. Though in many of the reported cases ridicule is assumed to be a cause of action, yet it is nevertheless usually coupled with something approaching the criminal, as if mere ridicule was not enough.¹ Lord Holt was one who had more than once thrown out as a dictum, that to make one ridiculous is actionable. And other judges, from time to time, followed without any attempt at discrimination.² And when a newspaper paragraph jocosely suggested, that "the painters were much perplexed about the likeness of the devil, but to obviate the difficulty Peter Pindar had recommended the countenance of Lord Lonsdale," that peer applied for a criminal information. Though Erskine gave good reasons for laughing such a case out of court, Lord Kenyon said he must abide by the rules the court had laid down, and allowed the information to be issued.³ And when Cobbett's newspaper ridiculed the Lord Lieutenant of Ireland as a very eminent feeder of sheep in Cambridgeshire, Lord Ellenborough, C. J., said no man had a right to render the person and abilities of another ridiculous in publications.⁴ But in another case

¹ In one case the plaintiff had told a ludicrous story of his going to an inn soon after the trial of a murderer in the district, and, being mistaken by the people for the hangman, he was afterwards, by a certain kindred allusion, nicknamed Jack Ketch at a public meeting amid roars of laughter. He sued a newspaper proprietor for publishing the original story about him, though it was only as he himself narrated it to some friends at an alehouse. The court held, that, if the plaintiff had authorised the publication of the story no action would lie, but there was a great difference between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a publication of it to all the world through the medium of a newspaper. Therefore, though no special damage was proved, yet the verdict in his favour was held to be right.—*Cook v Ward*, 6 Bing., 409.

² *Villars v Mousley*, 2 Wils. 403.

³ 3 Campb. C. JJ. 74.

⁴ *R. v Cobbett*, 29 St. Tr. 50.

the same judge, still more decisively, rather commended a critic for making ridiculous an author, who published dull and trifling works. He said, that "One writer in exposing the follies and errors of another may make use of ridicule, however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interest of a person suffer, it is *damnum absque injuriâ*. Where is the liberty of the press, if an action can be maintained on such principles? If the critic do not travel into the domestic life to point his slanders, and confine himself to criticisms proper, he performs laudable work."¹ In another case scarcely now intelligible a mayor of Northampton once sent Lord Halifax a present of a license to keep an alehouse, and this was deemed so offensive towards a peer (at a time when peers did not engage in trade), that the court granted a criminal

¹ Carr v Hood, 1 Campb. 357; Tabart v Tipper, Ibid. The Roman law went into greater niceties of this kind than our own, chiefly because society was differently constituted. Thus to call one who was a freeman a slave, or even to call his grandmother a slave, was a good cause of action.—Code 9, 35, 9-10. And to call one an informer was also actionable.—Code 9, 35, 3; or even to refuse to accept a man's security for his debt, if the object was thereby to defame him.—Code 2, 8, 51. And it was actionable to call a man a coward.—Gaius, Inst. iii., § 221; and in general to throw insult or contumely and contempt on any one, or his wife, children, or servants, was also actionable.—Heinec. pt. 7, § 118. Cordus was accused for calling Cassius the last of the Romans.—Montesq. b. 12, c. 14. In Athens it was actionable to say one belonged to a trade. There was also at Athens a law, that no comic poet should ridicule a living person by bringing him on the stage, (B.C. 440). And that no Areopagite should write comedies (B.C. 440), this last being presumed to be an infallible test of a vicious mind. And yet Alcibiades by his powers of ridicule and contempt put down the practice of young men playing on the flute.—Plut. Alcib. By the law of the Burgundians it was an offence punishable by a fine to call one a fox or a hare, as cunning or flight were viewed as infamous.—Barr. Penal Stat.

In the Gentoo code it was a criminal offence to accuse one of giving up his time to dancing, singing, or playing, or of refusing to eat with a descendant of the same grandfather, or of being found smelling at garlic or onions.—Gentoo Code, c. 15. And with a singular delicacy of feeling not traceable in any European laws, the same code made it punishable by a fine to reproach a lame or one-eyed man with his bodily defects.—Ibid. Jolly's Inst. Navada, c. 15. And the Institutes of Menu had the same law.—Inst. Menu, c. 8.

information.¹ No court however seems since to have acted on this precedent.

Slander imputing immorality or unchastity.—Though the law has long ceased to be considered a means of enforcing or even protecting general morality, still morality enters so largely into the composition of the higher standards of character, that to say or write of a third person, that he or she violates morality, either habitually or in some isolated act of conduct, might well be thought to be equivalent to attacking the reputation in a vital particular. But this is by no means the view of the law. The law at best is contented with a very coarse standard of conduct in this respect, and to impute immorality by spoken words is not like imputing an indictable offence or conduct savouring of fraud, for immorality *per se* is often neither an offence nor an actionable wrong. Yet to some professions this imputation is such an attack on character as will support an action for slander, and when made on the female sex will, when coupled with special damage, also be treated as slanderous or libellous. Under the head of imputations of professional misconduct on men or women an illustration will be found of such actionable wrong. As regards the spoken imputation of immorality or unchastity in the female character, the law does not regard this as actionable *per se*, however fatal it may be to the reputation of the female attacked, whether married or unmarried. Therefore to say, however falsely, of a woman that she is unchaste is not actionable, unless the words are written, or there is what is called special damage flowing from such imputation.²

De Grey, C. J., said, that for imputation of ignorance to one in a profession or an office of profit an action will certainly lie, though perhaps for imputation of ignorance to a justice of the peace, being only an office of credit, an action will not lie. But to impute by words to any man the mere defect or want of moral virtue, moral duties, or obligations which render a man obnoxious to mankind, is not actionable.³ And hence, to say of a physician, that he had committed adultery with a married woman was not

¹ 1 St. Tr. 422.
Horne, 3 Wils. 187.

² Wilby v Elston, 8 C. B. 142.

³ Onslow v

actionable, because it was not spoken of his relations with one of his patients.¹

The kind of special damage following a charge of immorality.—The nature of this special damage, which makes all the difference whether spoken words imputing immorality are actionable or not, is difficult to be defined beyond this, that it is some species of pecuniary loss resulting naturally, and not merely accidentally, from the depreciation of character involved in the slander. It has been said, that if some such special damage arose from laudatory words it would give rise to no action, for the words must be more or less by themselves sounding in detraction.² Moreover the special damage must not be too remote. Thus, where an actress had been libelled as immoral, and was so shaken in her nerves that she could not do her part well, the proprietor of the theatre sued the libeller; but Lord Kenyon said the damage was not sufficiently shown to be an immediate result so as to found an action.³

The only kind of special damage required to be proved in order to sustain an action for such spoken words is usually this, that some person declined to marry the female in consequence of the slander.⁴ And it is true she must do more than say, she lost her reputation and several suitors, for she must name these suitors.⁵ And a man may sue also for loss of marriage with a specified female in consequence of a like slander of his morality.⁶ Thus a widower clergyman was seeking in marriage a lady "by whom he was likely to have had a good preferment, and was in possibility to obtain her," when he was met with the following strictures: "He is a sharking fellow and getteth his living by deceit, and used himself violently to his former wife and denied her necessaries; and is a needy fellow, and his conditions are wicked; and for his religion, he is a Brownist." He lost the lady and sued the slanderer. The defendant could not prove anything to justify the slander, and the court held the special damage made it a

¹ *Ayre v Craven*, 2 A. & E. 2.
Partington, 5 B. & Ad. 645.

² *Littledale, J., Kelly v*
Astley v Harrison, Peake, 256;
2 Camp. C. JJs. 65.

⁴ *Davis v Gardiner*, 4 Rep. 16; *Reston v*
Pomfret, Cro. Eliz. 639.

⁵ *Barnes v Prudlin*, 1 Vent. 4.
⁶ *Mathew v Crass*, Cro. Jas. 323.

good cause of action.¹ In one case an innkeeper, in consequence of an imputation of gallantry with a married woman, alleged, that he lost his customers, or what is equivalent, lost his trade, and this was held sufficient special damage, though he did not specify the names of the customers lost.² So where it was said of a shopkeeper's wife, that she had committed adultery on the premises.³ And for a like reason a dissenting minister suffered special damage by a like slander, whereby persons ceased to frequent his chapel, for he could not be expected to name all those who so left him.⁴

But the mere loss of the society of friends by itself is not deemed this description of special damage, which the law takes notice of. And hence also the mere loss of becoming a member of some society or congregation of dissenters, which refused admittance to a candidate on account of a slander on her chastity, was held no substantial special damage.⁵ So, as already observed, the mere loss of suitors without naming them will not amount to special damage.⁶

A slander of chastity causing special damage.—But if the loss of society is accompanied with some substantial temporal loss of meat and drink supplied by the hospitality of friends, then the law will recognise it, and enable the slandered female to sue the slanderer. In one case a spinster lady sued M for saying of her that she was incontinent, whereby, as she alleged, she had lost the society and hospitality of friends who used to invite her to their houses and to entertain her with meat and drink, and thereby enabled her to live more cheaply than she could do without such help; and the court held, this was a substantial pecuniary loss, and being proved, she was entitled to sue and recover damages.⁷ And a married woman may sue on the same ground, if she allege and prove the same loss.⁸ But except a married woman has lost meat and drink in the houses of her friends, she has no claim to any redress for spoken words imputing unchastity to her. In

¹ Wicks v Shepherd, Cro. Ch. 155; Southold v Daunceston, Ibid. 269. ² Collins v Mathews, 3 Keb. 242. ³ Riding v. Smith,

1 Exch. D. 91. ⁴ Hartley v Herring, 8 T. R. 130. ⁵ Roberts v Roberts, 5 B. & S. 384. ⁶ Barnes v Prudlin, 1 Sid. 396.

⁷ Moore v Meagher, 1 Taunt. 139. ⁸ Davies v Solomon, L. R., 9 Q. B., 114.

one case, owing to a slander against a wife that she had been before her marriage all but seduced by B (a third person) and asserting, that the husband should not allow B to visit his house, the husband in consequence of this slander sent her home to her parents. The wife (adding the name of the husband) sued the slanderer, alleging the loss of the husband's society as the special damage; but the court doubted whether an action would lie for such loss of society by a wife; and at all events in this case the special damage was not the natural consequence of the slander, because a prudent husband would not on account of it have acted so unreasonably as to separate from the wife, for all that he would have done would be to watch her conduct a little more carefully.¹ And as a wife could not lose her maintenance from the husband, owing to a mere slander of that kind, she was thus practically without any redress. And for a like reason the increased expense caused to a husband in medical attendance required by a wife, whose health suffers from a false slander in her chastity, is deemed no special damage, being too fanciful and remote.²

If words imputing unchastity are written, then they are actionable.—But while spoken slanders on the chastity of women are thus only actionable when pecuniary loss follows, it is altogether different when one puts the words in writing or in print. Thus when a newspaper about 1792 published of a young girl, a daughter of a peer, that “she had made a *faux pas* with a gentleman of the shoulder-knot,” for which imputation she sued the publisher, and no justification of the truth of such libel was offered, Lord Kenyon told the jury, that the cause of injured innocence was in their hands, and that they should teach by their verdict that class of publishers who traded in scandal the peril of their vocation. And the jury at once gave a verdict of 4000*l*.³

Slander and libel of professional misconduct or incompetency.—Another head of slander as well as libel is where the professional or business character of a person is involved. In order to make this kind of imputation actionable, whether the words are spoken or written, no

¹ *Lynch v Knight*, 9 H. L. C. 599; *Parkins v Scott*, 1 H. & C. 153.

² *Alsop v Alsop*, 5 H. & N. 534. ³ 3 Camp. C. JJs. 66.

special damage need be shown, for indeed the livelihood of any man is thereby directly attacked, and hence damage is presumed to follow naturally and inevitably. Words therefore, imputing misconduct or gross ignorance connected with some trade or business which is exercised with profit or capable of being so, are actionable without alleging special damage, though the same words might not be actionable if not used in connection with such trade or business. Such are words of the following tenor : imputing that he (a tradesman) constantly cheats his customers ;¹ or sells articles he knows to be bad ;² or uses false weights ;³ or is bankrupt or insolvent, or can be made so ;⁴ or that he (a physician) is a quack ;⁵ that he (an apothecary) killed a patient with physic ;⁶ that he (a physician) is so wanting in skill or character that other physicians refuse to meet him ;⁷ that he (a counsel) gives corrupt and deceitful advice only to fill his own pocket, or disclosed his case to the adversary ;⁸ that he (a solicitor) is no lawyer, no more lawyer than the devil is ;⁹ or is well known to be corrupt ;¹⁰ or that he hath no more law than C's bull, or than a goose ;¹¹ or cheats his clients ;¹² or had been reprimanded for sharp practice.¹³ So if it is said of a clergyman beneficed, that his conduct in paying a curate so savoured of fraud that he ought to be degraded ;¹⁴ or of a beneficed clergyman that he was the father of a bastard child, and yet if the clergyman was not beneficed this would not be actionable *per se* ¹⁵ ; or that he performed divine service in a towering passion, and his conduct made infidels of his congregation. ¹⁶ So it is to say of a Roman Catholic bishop, that he converted a priest by offers of money and preferment ;¹⁷ that a captain has an unseaworthy ship ;¹⁸ that an exhibitor of flowers at exhibitions secures prizes by tricks and dirty

¹ Reeve *v* Holgate, 2 Lev. 62. ² Evans *v* Harlow, 5 Q. B. 633.
³ Griffiths *v* Lewis, 7 Q. B. 65. ⁴ Brown *v* Smith, 13 C. B. 599 ;
 Robinson *v* Marchant, 7 Q. B. 918 ; Sheppard *v* Whitaker, 4 R.,
 10 C. P. 502. ⁵ Goddard *v* Haselfoot, 1 Rol. Ab. 54. ⁶ Tutty *v*
 Alewin, 11 Mod. 221. ⁷ Southee *v* Denny, 1 Exch. 196. ⁸ Snag
v Gray, 1 Rol. Ab. 57 ; King *v* Lake, 2 Vent. 28. ⁹ Day *v* Buller,
 3 Wils. 59. ¹⁰ Birchley's Case, 4 Rep. 16a. ¹¹ Baker *v* Morfue,
 Sid. 327. ¹² Alleston *v* Moor, Het. 167. ¹³ Boydell *v* Jones,
 4 M. & W. 446. ¹⁴ Pemberton *v* Colls, 11 Q. B. 461. ¹⁵ Galloway
v Marshall, 9 Exch. 294. ¹⁶ Walker *v* Brogden, 19 C. B., N. S. 65.
¹⁷ Tuam *v* Robeson, 5 Bing. 21. ¹⁸ Ingram *v* Lawson, 8 Scott, 478.

work.¹ So to say that A had poisoned the foxes and that his effigy had been burned in consequence;² and that B had systematically annoyed the plaintiff for years, and dragged him unnecessarily into Chancery;³ that an article sold by plaintiff had a silly, slangy, and vulgar name, and had been forced on the notice of the public *ad nauseam*.⁴

In considering such cases it is to be recollected, that certain qualities are more important to some professions than to others. In one case the plaintiff, a public prosecutor in high office, was described as a "viper-whom my father nourished, who had once instilled principles of rebellion into the prisoner (whom he prosecuted); and then with a speech to evidence lashed him who was the pupil of his own sedition." The judge held this was libellous, because it implied that the plaintiff was in his office forgetful of every principle of justice.⁵ Another plaintiff, a Roman Catholic archbishop, was described in print by an editor as one "who published exhortations from the pulpit to the people to be peaceful, when he knew all the time of an impending insurrection, and though well treated by the Government, yet treacherously failed to give notice of it to the authorities." This was held actionable because destructive of clerical character.⁶ And so where an under-secretary of state was charged with "dark and cowardly malignity, and stabbing an officer behind the back."⁷

Such words however must be used in connection with the trade or business, and impute something prejudicial to its useful and profitable exercise. Hence they are not actionable if the business has entirely ceased to be carried on or exercised;⁸ or if the words are mere general abuse not affecting the special business;⁹ or if the matter imputed is not essentially destructive of professional character, as imputing to a medical man adultery, but not with a patient.¹⁰ The older judges once said, that you may

¹ Green v Chapman, 4 Bing. N. C. 92. ² R. v Cooper, 8 Q. B. 533. ³ Fray v Fray, 17 C. B., N. S. 603. ⁴ Jenner v A'Beckett, L. R., 7 Q. B. 11. ⁵ Plunket v Cobbett, 29 St. Tr. 80. ⁶ Troy v Symonds, 29 St. Tr. 503. ⁷ R. v Drakard, 30 St. Tr. 1025. ⁸ Bellamy v Burch, 16 M. & W. 590. ⁹ Pemberton v Collis, 10 Q. B. 473. ¹⁰ Ayre v Craven, 2 A. & E. 2.

“call a watchmaker a bungler, and that he does not know how to make a good piece of work, but, if you say he don’t know how to make a good watch,” it is actionable.¹ At that time the judges were very jealous of these actions, and construed everything as literally as possible against the plaintiff. And so they said “You may call a merchant a beggarly fellow and not worth a groat; but if you add that he is not able to pay his debts, this last assertion will be actionable.”² And you may call an attorney “a cheating knave,” but if you say he cheated his clients, that would be actionable.³

Rival tradesmen libelling each other.—There is still one difficult class of cases, where one tradesman, by handbills and circulars, in comparing his own wares with another’s of a like kind, uses words disparaging them as unfit for the purpose. It is difficult here to draw the line and say, when he transgresses the limits of free comment. An action may lie for falsely asserting that goods are inferior, though no imputation is made on the person selling, especially if special damage result. But if details are given and reasons for preferring one manufacture to another, there is nothing actionable in this kind of comment.⁴ A tradesman offering goods for sale exposes himself to observations, and it is not by averring words to be false, scandalous, malicious, and defamatory, that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another’s to the risk of an action. In one such case the defendant did not caution people against any fraud in the plaintiff, but only said, “He sells defective goods;” any one selling the same

¹ *Redman v Payne*, 1 Mod. 19. ² 3 Salk. 326.

³ *Hetley*, 167. LAWRENCE, J., said, “Many of the old cases on slander went a very absurd length. There is one, *Cro. Jas.* 184, where the charge was that the plaintiff had struck his cook on the head with a cleaver, and cleaved his head; the one part lay on one shoulder and another part on the other; and yet the judgment was arrested after verdict, because it was not directly averred, that the cook was killed, but only argumentatively. All these cases have been long set at rest.”—*Woolnoth v Meadows*, 5 *East*, 468.

⁴ *Young v Macrae*, 3 B. & S. 264; *Western Co. v Lawes*, L. R., 9 *Exch.* 218.

articles would have as good a right to complain as the maker of them.¹

Defaming one who holds public or honorary office.—While one who pursues a profession, trade, or business as a means of livelihood may maintain an action, as already stated, there is an amplification of the same rule when the office is merely honorary, such as that of a justice of the peace, municipal officer, or a member of Parliament. With respect to honorary offices, though pecuniary loss may not be caused by the use of libellous words, yet the holders of such offices are entitled to the protection of such character and reputation as naturally belong to such offices. Great mental capacity is not deemed a vital essential: but perfect integrity, freedom from any flagrant immorality, and freedom from corrupt practices are essential to the due discharge of such office. A justice of the peace was once told to his face, that he was “a fool, an ass, and a beetle-headed justice,” and three out of four judges of the High Court after argument held, that these epithets were at the worst only an imputation of defective mental acuteness, or “sounded in disability only,” and were not actionable as imputing anything corrupt or dishonest or disaffected to the Government.² Accordingly it was actionable to say, that a justice was a Jacobite, for that word was at the time synonymous with criminal

¹ *Evans v Harlow*, 5 Q. B. 624. The Prince of Wales's gunsmith was once held to have good cause of action against a man for saying “his guns were not good, that he was no artist, and was afraid to try experiments with them;” as these assertions were said to discredit him in his business as a manufacturer.—*Harman v Dunsany*, 1 *Str.* 899.

Words imputing that an individual is afflicted with a *contagious disease*, which causes his company to be shunned, are also actionable without special damage.—*Bloodworth v Gray*, 7 *M. & Gr.* 334; 8 *Sc. N. R.* 9. As by imputing the itch.—*Villers v Moulsey*, 2 *Wils.* 403. The old cases abound in phrases imputing various ailments of this description.—*Clifton v Wells*, 12 *Mod.* 633. But words imputing past disease are not actionable.—*Carslake v Mapledoram*, 2 *T. R.* 475.

² *Bill v Neal*, 1 *Lev.* 52. *HOLT*, C. J., afterwards gave the true and only reason, namely, that “it is no man's fault that he is a block-head, for he cannot be otherwise than his Maker made him; and though a man cannot be wiser, he may be honestest than he is.”—*How v Prin*, *Cas. Holt*, 652; 2 *Salk.* 694.

designs against the Government.¹ And it is the same if a justice is called a liar, for that imports some quality incompatible with integrity of conduct as a magistrate.² So if he is called a bribing justice, as, for example, that he will do anything for a couple of capons. And Twisden, J., added, "So if he is called a debauched man";³ and so if he is called a hider of felonies;⁴ or if he is called directly or indirectly a corrupt judge.⁵ But where a member of Parliament was said never to keep "his word except to serve his own interest," the court left it doubtful, whether this was actionable.⁶

Libelling one holding office of profit.—When the office or business is one of profit, the reason for the action of slander or libel is self-evident, for many imputations relating to such office naturally tend directly to damage the holder, and reduce or destroy its emoluments. An epithet may be harmless as to some offices which would be ruinous as to others; and to destroy any man's means of livelihood may well be admitted to be an actionable wrong. And such is the rule.⁷ In considering, it is true, the applicability of the words, it must be seen whether the words have a natural tendency to cause injury, and not merely that they may probably do so. In most of the decided cases the words clearly impute something gross and incompatible with honour, veracity, fidelity, and refer specifically to the office. On the other hand, mere imputations of a fault of morality or want of ability are not actionable without alleging special damage.⁸

The action of scandalum magnatum.—One degree of slander and libel, called *scandalum magnatum*, was singled out in rude times as peculiarly flagrant, namely, scandalising men in high position. This wrong rose into prominence before the law had attained a settled condition, the glory of which is to defend the reputation of all classes of men with impartial hand, and most of all those, whose character is their daily bread and not a mere flourish of wealth and power. Nevertheless this law about protecting the repu-

¹ How v Prin, 2 Salk. 694.

² Aston v Blagrove, 1 Str. 617.

³ Kerle v Osgood, 1 Vent. 50.

⁴ Stuckley v Bulhead, 4 Coke,

16a, 19a.

⁵ Parmiter v Coupland, 6 M. & W. 109.

⁶ Onslow

v Horne, 3 Wils. 177.

⁷ Onslow v Horne, 3 Wils. 186; Lumby

v Alday, 1 Cro. J. 305.

⁸ Hopwood v Thorn, 8 C. B. 313.

tation of great men was the root, which, growing in a rude and ignorant age, afterwards expanded till it acquired its present equal and impartial character. It has sometimes been the wonder of modern times, that these statutes are still unrepealed, as they are now seldom acted on.¹ The Bishop of St. David's told the earliest Parliament, that slanderous persons were dogs that eat raw flesh, and they must be punished.² And accordingly the statutes were passed soon after the Black Death and the decline of villainage gave freer tongues to the lower orders; though the first statute was in the time of Edward I.³ The second statute was passed to protect the character of John of Gaunt, but it enumerated all peers, judges, and great men and officers of the realm as entitled to the same protection, the reason alleged being, that the defamation of such may occasion disputes between the Lords and Commons.⁴ This statute was said to be remarkable for no action being brought under it for 120 years, though it was also at the same time said to be only a declaration of the common law.⁵ Any criminal proceeding for libel was apparently unknown until the time of Richard II. Before that time, or at least before the statute of 3 Edward I., mere words were not actionable without special damage, it being no doubt an axiom of law as well as of manners, that these petty provocations could be cured by a blow.

Though the remedy for *scandalum magnatum* was in the form of a criminal proceeding, it was soon held that it was a good cause of action, on the principle that if what is prohibited is done to the special injury of an individual, that individual may sue by action.⁶ And it was even held that the truth of the news was no defence, the only reason

¹ LORD CAMPBELL, though inclined to urge the legislature to repeal these statutes, found it difficult to do so, as they did a very whole-some thing in forbidding the telling of lies about great people.

² 2 Mod. 161. In the Buddhist code, to speak insultingly of a man of the highest caste was so heinous a crime, that a red hot style was thrust into the offender's mouth, or the tongue was cut out.—Jolly's *Inst. Nevada*, c. 15. The Spanish Goths made it a penal offence to call a great man gouty, or to omit his proper title in writing to him a letter.—*Feuro Real de Esp.* 209.

³ 3 Ed. I. c. 34; 2 Rich. II. st. 1 c. 5; 12 Rich. II. c. 11; 3 Rot. Parl. 168, 186. ⁴ 2 Rich. II. st. 1. ⁵ *L. Townsend v Hughes*, 2 Mod. 161; *Freem.* 222. ⁶ 2 Inst. 225.

given being, that the king was concerned, that is to say, it was a public offence.¹ The courts seem to have applied the rules of the common law to the enforcement of this remedy somewhat more liberally than modern notions would allow. Lord Dorchester, in 1660, got a verdict against the defendant for saying of him "He is no more to be valued than the black dog which lies there."² Lord Pembroke was held entitled to sue a man for saying, "He was a pitiful fellow, and no man would take his word for two-pence."³ It was also held actionable to say, that the Lord Chief Baron was deaf of one ear, as this was apparently assumed to have a deep symbolical meaning.⁴ Lord Townsend, in 1676, brought an action against Dr. Hughes for saying, "He was an unworthy man, and acted against law and reason." The jury gave a verdict for 4,000*l.*, and the court held this was no ground for a new trial, as they could not set a value on the plaintiff's honour.⁵ All these cases were, however, thrown into the shade a few years later. The Duke of York, in 1682, obtained a verdict of 100,000*l.* against Pilkington for saying in the Guildhall, at a meeting of aldermen of the city of London, that "the Duke had burned the city and was now come to cut the citizens' throats." The defendant chose to have the trial in Hertfordshire, and the jury, who were all gentlemen of quality, in a quarter of an hour found their verdict.⁶ A verdict for the same amount was returned in another action by the Duke against Colt;⁷ and even against Titus Oates, who, however, made no defence, they were equally liberal.⁸ The Earl of Macclesfield, in 1686, sued Starkey for saying, that the Earl was a seditious addresser, and obtained a verdict of 10,000*l.* And the same in an action of Duke of Ormond *v* Hatherington.⁹ During the last two centuries peers and great men have usually contented themselves with ordinary remedies, and especially with the remedy of criminal information.

Liability for repeating a slander or libel.—Great looseness long prevailed in our law as to the position and responsibility of one who repeated a slander or libel and

¹ 2 Mod. 166. ² 1 Sid. 233. ³ Freem. 49. ⁴ Hetley, 167.

⁵ Townsend *v* Hughes, 2 Mod. 166. ⁶ Bulstr. Mem. 321; 9 St. Tr. 299. ⁷ 10 St. Tr. 126. ⁸ Ibid. 127. ⁹ 10 St. Tr. 1334.

gave circulation to it; and the misconception no doubt arose out of the vague manner in which the early statutes about false news, as we have seen, were framed. Such statutes seemed to imply, that if those who repeated a slander only gave up the author's name, they would escape all liability.¹ Lord Ellenborough, C. J., so late as 1804, said the rule laid down in Coke's time,² which was confirmed in a later case,³ was, that, in order to enable a defendant to justify slanderous words upon hearsay, he must disclose at the time of uttering the slander the name of the person from whom he heard it; and it was not sufficient to name him for the first time by his plea. The object of this rule was said to be to give the plaintiff his action in the first instance against the original author of the slander.⁴ And yet the same judge held, that repeating a libel was no defence whatever in a criminal proceeding.⁵ And another judge added, that it was a very good rule, that if a party will repeat slanderous words which he hears another say, he ought to do so in such a manner as will give the person injured an opportunity of bringing his action against somebody.⁶ A little later, however, it was said to be no defence in general to an action, that the name of the author of the libel has been given up, though it might be a good defence in particular circumstances.⁷ And the rule to the contrary, once said to be adopted in the time of Coke, was not applicable at least to written words.⁸ But neither the old rule nor the above modification of it has stood the test of examination, either as regards a written or a spoken calumny.⁹ If it were held any defence, that one merely repeated the slander of another, the slandered person would in many cases have no remedy whatever, for the original utterer may be a pauper, or a prisoner, or a man of straw.¹⁰ The result, therefore, now is, that he, who repeats a slander, is equally liable with the originator, and cannot get quit of liability by naming the first utterer; nor though he stated it not as

¹ See those statutes, *ante*, p. 53. ² *Norhampton's Case*, 12 Rep. 133. ³ *Davis v Lewis*, 7 T. R. 17. ⁴ *Woolnoth v Meadows*, 5 East, 469. ⁵ *R. v Drakard*, 30 St. Tr. 1025. ⁶ *Per Lawrence, J.*, *Woolnoth v Meadows*, 5 East, 472. ⁷ *Per Tindal, C. J.*, *Ward v Weeks*, 7 Bing. 216; 145 Parl. Deb. (3) 74. ⁸ *Tidman v Ainslie*, 10 Exch. 66. ⁹ *Crespigny v Wellesley*, 5 Bing. 404. ¹⁰ *Macpherson v Dannels*, 10 B. & C. 263; *Watkin v Hall*, 9 B. & S. 279; L. R., 3 Q. B. 396.

a volunteer, but in answer to a question.¹ If, indeed, the repetition does not purport to be a statement of a fact, but rather to be for inquiry, no liability may be incurred.² But the repetition of a slander is not even deemed the natural and immediate consequence of first uttering it unless in very special circumstances.³ And the same remedy lies against the one who repeats, as against him who invents a slander or libel.

Excusable libels on privileged occasions.—Such being the nature of the attacks upon reputation which the law punishes, it is now necessary to consider what are excusable libels, or libels which the law will not punish. The rights of free speech are so constantly in exercise, and directed to subjects so widely diversified, that libels are all but inevitable not only from the recklessness, passion, and malignity of many, but also from certain urgent occasions besetting others, and which may involve no blame, but rather may do much good. Some libels are excused for this reason, that they are committed in the course of some lawful occupation, which ranks higher in the general estimation by being a benefit to great numbers, than the injury done, which is usually confined to one person only. When the two rights are incompatible, the law must make a distinction and prefer one to the other; and many examples will be found of this necessity. It is better that one person should suffer than that all should go without some necessary protection in the course of their own lawful and urgent business affairs.⁴

Meaning of the words "privileged occasion, privileged communication."—Though it has become an inveterate habit to use the words "privileged occasion," and "privileged communication," to denote certain circumstances under which something that would be actionable *per se* ceases to be so when the occasion is taken into account, it is a misapprehension of the meaning of words to call it a privilege. What is really meant is in no sense a privilege, but is a right, namely, the right to carry on one's business or to take advantage of one's situation and

¹ Griffiths v Lewis, 7 Q. B. 64.

² Crawford v Middleton,

1 Lev. 82.

³ Vicars v Wilcocks, 8 East, 3; Knight v Gibbs,

1 A. & E. 46; Parkins v Scott, 1 H. & C. 153.

⁴ See also *ante*, chap. i.

circumstances, and this last is only another way of saying, that each is entitled to manage his own affairs for his own advantage. The carrying on of business often inevitably involves the necessity of slandering or libelling some third party. The slander or libel in such circumstances is, however, only an incident to the lawful business so carried on, and being not invented or used for the purpose of libel or slander or injury, is in precisely the same position as a blow or even a homicide committed in self-defence or under some proper justification. Thus the giving of a servant's character between master and master is part of the legitimate business of life, and unless the truth were spoken on such an occasion society could scarcely go on. Therefore, whenever in the exchange of this kind of information something is said which would be a slander or libel of the servant if no such occasion existed, it can be no cause of action. For the law deems it more important that characters should be given truly than that any one servant should suffer inconvenience from such a practice. The former ranks higher in the eye of the law, and the latter, being an inevitable incident, is deemed *damnum absque injuriâ*. Thus the use of the word "privileged communication" is due to some confusion of thought, for masters have no more a privilege to libel a servant than any person who has to defend his life has a privilege to slay the attacking party. The same expression of privilege is often used as an occasion of negating malice, and this again is only a short expression to indicate that the person suspected of the malice was not doing the act or uttering the slander or libel in course of any lawful business of his own which the law protects. The more correct description of libels on these privileged occasions, as already stated, is to call them excusable libels, and with this explanation the two expressions are used as convertible. Most of these excusable libels or privileged occasions have been reduced to a few well-known general heads, which require to be noticed as exceptions to the general rule governing libel and slander.¹ Whenever a person not in the exercise of any lawful business of his own which the law protects, or not requiring so to act in self-defence, or for any reasonable

¹ Wright v Woodgate, 2 C. M. R. 573; *Per Erle, J.*, Gilpin v Fowler, 9 Exch. 615.

object, goes out of his way to attack another's character and social reputation, and thereby does injury either actual or reasonably probable, then it is that a defamatory act is committed—the degree and the occasion and subject matter furnishing the characteristic test. When one oversteps the limits of this kind of lawful business and of just comment on his neighbour's character, then it is that the wrong will be committed. The difficulty always lies in detecting, when this line has been transgressed—when lawful business ends and unlawful attack begins.

Whenever, therefore, a person is exercising those rights of free speech mentioned in the previous chapters, such as the right of comment on all public matters, the publishing of debates of Parliament and reports of courts of justice, he is in the pursuit of his own lawful business, for the public business to that extent is his private business, and the law will protect him at all hazards. And over and above those occasions, whenever the alleged slanderer or libeller had some interest of his own in the nature of business or friendship, or urgent moral duty, and acts honestly in the promotion of such interest or duty, and not with the sole view of injuring a third party, in these circumstances also the law will protect him in his right of free speech at all hazards.¹

Excuse of libel in giving servants' characters.—One

¹ *Toogood v Spyring*, 1 C. M. & R. 193. "In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander). And the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."—*Parke B.*, *Toogood v Spyring*, 1 C. M. R. 181.

"Though the word 'privilege' is used loosely in several cases as applied to the right which every person has to comment on public matters, the real question is whether the alleged libel is a fair comment such as every person might make upon a public matter, and if not there is no privilege."—*Campbell v Spottiswoode*, 3 B. & S. 779.

of the most frequent occasions of alleged libel is where one master gives to another an account of the character of a servant. As the business of life could not go on, unless a true account were given by one employer to another of whatever faults had been experienced, it is inevitable that some things stated truly should detract from the servant's character. But to allow this incident to interfere with the lawful business of mankind in giving and receiving these honest reports would be preferring the small to the great. As Lord Ellenborough said, the communications of business are not to be beset with actions of slander.¹ Nevertheless this delicate business of giving a servant's character must be done with care, and all the consideration towards the servant which due regard to the primary object admits of. On these necessary occasions of inquiries between masters, though the master referred to is not bound to make any statement in answer, and if he refuse either to answer or give details of the truth of his answer, this is no evidence of malice,² yet if he do answer, whatever he says must be honestly believed to be true as to the character of the servant so far as he knew the whole facts. And slight circumstances will show a malicious feeling as the real motive, such as the master's saying, that "He has already given two characters, and begs not to be troubled again."³ Moreover the master is not excused, if he be acting as a volunteer, and not in answer to questions put to him. And yet if he first volunteer information, and then be asked to give further particulars, this last inquiry will lead the jury to say, whether the whole matter, from the first to the last, was volunteered and malicious.⁴ And the late master is still acting in discharge of this public duty when he communicates to the intending master any credible information he has received of misconduct of the servant after leaving the situation;⁵ and it is within the limits of the privilege, if he mention the character to two previous masters who had recommended such servant to him, though they had not asked him for his report.⁶ And if he has given what he honestly believed a correct character,

¹ *McDougall v Christie*, 1 Camp. 267. ² *Harris v Thompson*, 13 C. B. 348. ³ *Fountain v Boodle*, 3 Q. B. 5. ⁴ *Pattison v Jones*, 8 B. & C. 578. See also *Fryer v Kinnersley*, 15 C. B., N.S. 422. ⁵ *Child v Affleck*, 9 B. & C. 403. ⁶ *Ibid*.

but which he has since discovered to be undeserved, it is part of his duty to communicate this fact, for the privilege lasts as long as anything is undiscovered relating to the subject matter.¹ Though a master in giving a character of a servant, when asked for it, is not bound in the first instance to give evidence of its truth, yet if an action is brought by the servant, who gives *prima facie* evidence that the character given was not true, it is then incumbent on the master to give some evidence of its truth, otherwise malice may be inferred against him.² A like privilege also extends to the master when giving an answer separately to two fellow servants who demand each the reason for his dismissal—the answer, for example, being, that both had robbed him.³ And even when a master, on alluding to a dismissed servant, volunteers the reason of such dismissal as a caution to the fellow servants, this statement will be protected as made under a sense of duty.⁴ In one case the master dismissed S, a servant, and when asked for a character replied, that he had dismissed S for dishonesty. Afterwards S's brother again asked the master the reason why he was so treating S, and keeping him out of a situation, and the reply was "He has robbed me, and I believe for years." On an action being brought only one instance of robbery was proved; but the court held the whole answer was privileged, though the words were put a little too strongly.⁵

And even a volunteer may in some cases honestly give information to a master about malpractices of his servant, if the volunteer is also interested in the subject matter of these malpractices.⁶ As Tindal, C. J., said, a man who received a letter informing him that his neighbour's house would be plundered or burnt on the night following by A and B, and which he himself believed and had reason to believe to be true, would be justified in showing that letter to the owner of the house, though it should turn out to be a false accusation of A and B.⁷ Any restriction on such honest communications, even from a stranger, would

¹ Gardiner v Slade, 13 Q. B. 801. ² Rogers v Clifton, 3 B. & P. 591; Fountain v Boodle, 3 Q. B. 5. ³ Manby v Witt, 18 C. B. 544. ⁴ Somerville v Hawkins, 10 C. B. 583. ⁵ Taylor v Hawkins, 16 Q. B. 308. ⁶ Macdougall v Claridge, 1 Camp. 267. ⁷ Coxhead v Richards, 2 C. B. 596.

operate as a great restraint upon the performance of the various social duties by which men are bound to each other.¹ In all such occasions of giving a servant's character, it is true, the one master should make the communication to the other master privately; still there is no rule that, if a third party is present, this will of itself destroy the privilege as showing malice, for such nicety of conduct is often impracticable.² And where the master on giving the character calls in a friend to witness what is said, this will be no evidence whatever of malice in the master, but is often a very prudent precaution for every one to adopt.³

Excuse of slander and libel as between those confidentially related.—A similar excuse for libel exists in those occasions of confidential relationship which naturally lead one relative or friend to communicate to another whatever is of value to their mutual interests. On such occasion a communication with a view to prevent injury to a friend, though volunteered, is privileged, if naturally arising out of the duty of friendship, and if the party is not using that relationship as a pretext for libel or for retailing idle gossip. Such was the case of a son-in-law warning his stepmother, a widow, as to the character of a suitor of hers.⁴ And when one friend consults another confidentially as to a matter of business or personal interest to himself, the answer is privileged; as when a tenant on invitation tells his landlord about what he has noticed as to the game on the estate;⁵ when a friend is asked as to the character and charges of a solicitor about to be employed;⁶ or as to reputed misconduct of a third person.⁷ And the same privilege will protect future

¹ Coxhead v Richards, 2 C. B. 596. ² Toogood v Spyring, 1 C. M. R. 193. ³ Taylor v Hawkins, 16 Q. B. 308.

⁴ Todd v Hawkins, 2 M. & Rob. 21. A mate of a ship wrote to his friend D, giving a long account of the captain's drunken fits and danger thus caused, and D, who had no interest in the ship, informed the shipowner, who discharged the captain. The court was equally divided as to how far this was a privileged communication of D.—Coxhead v Richards, 2 C. B. 605. And the same court was equally divided as to whether a caution given by A voluntarily to a trader not to trust one D, the reason given being that D owed a large debt to A, was a privileged communication.—Bennett v Deacon, 2 C. B. 628.

⁵ Cockayne v Hodgkinson, 5 C. & P. 543. ⁶ Macdougall v Claridge, 1 Camp. 267. ⁷ Hopwood v Thorn, 8 C. B. 293.

communications between the confidential parties arising out of the same matter.¹ And if a comparative stranger himself apply to B for information, he may create a confidential relation between them which will estop him or any other from treating B's answer as libellous.² As where a shop-keeper, believing A's servant had stolen something from his shop, went and told A the reasons of his suspicion, this was held privileged.³ But there is no confidential relation or privilege between the agents of two members of Parliament which would justify one of them who imputes bribery to a voter for the other.⁴ In one case a tradesman received a written order for goods in the name of S, and sent the goods; these S returned, saying he had never ordered them. Thereupon the tradesman sent for inspection to S the written order itself, which S returned with a letter stating, that he believed the order was written by C, who afterwards sued S for libel. But the court held the answer was a fair one to such an inquiry, though rather going beyond it, and therefore being a privileged communication, S was not responsible.⁵ In another case the incumbents of two parish churches corresponded about the conduct of a member of one of the churches while visiting in the other parish, and a dispute about that member purchasing a horse arose, in which the one incumbent asked the other to be arbitrator. The incumbent so asked to arbitrate on further inquiry reported certain things to the discredit of the purchaser, and the court held that this all arose naturally out of the privileged communication, and was not actionable.⁶ And so where P was asked by a subscriber to the same charity to support one of the trustees, and P in answer stated things to the discredit of that trustee, the answer was held protected from liability.⁷

In written communications between parishioners and the clergyman, or between members of a congregation and their pastor, there is no privilege protecting the clergyman *quod* clergyman. A clergyman has no such close interest in the morals of his parishioners as to justify him in

¹ Beatson *v* Skene, 5 H. & N. 855. ² Hopwood *v* Thorn, 8 C. B. 316. ³ Amann *v* Damm, 8 C. B., N. S. 597. ⁴ Dickeson *v* Hilliard, L. R., 9 Exch. 79.

⁵ Croft *v* Stevens, 7 H. & N. 570. ⁶ Whiteley *v* Adams, 15 C. B., N.S. 392. ⁷ Cowles *v* Potts, 34 L. J., Q. B. 247.

publishing a circular warning them against sending their children to the school of G, a parishioner, because in the opinion of such clergyman G had committed some infringement of the precepts of Scripture.¹ But a parishioner may well mention to his own parish clergyman suspicions as to the conduct of such clergyman and of his solicitor, who were acting as trustees in a private matter.² And where a bishop, commenting on certain charges made about his exercise of patronage, addressed his clergy in convocation in self-vindication, and published this charge, it was held that his interest was such as to justify both the address and its publication.³

Excuse of libel in protecting pecuniary interest.—On similar principles to those governing friendly and confidential relationships, where a person has a pecuniary interest in the subject matter, and while honestly believing he is protecting it, libels a third party, this also is an excuse for what is done. Such cases arise where a party interested communicates to a bank misconduct of their solicitor;⁴ where a ratepayer complains to his parish vestry of their parish constable's accounts;⁵ where a creditor gives notice of an act of bankruptcy of his debtor to an auctioneer who is employed by the debtor to sell his goods;⁶ where a solicitor writes in self-vindication to his client in answer to a proposal to dispense with such solicitor's services.⁷ A subscriber to a charity has no such legal interest in the charity, or such relationship to other subscribers as to justify his slandering or libelling to those others the conduct of an official of the charity;⁸ but one creditor of a bankrupt has an interest in writing to another creditor about the conduct of their common debtor.⁹ And one director may rightly complain to his fellow-directors about their common officer.¹⁰ But there is no sufficient interest in a voter at an election to justify the latter publishing in a newspaper a libellous statement about the Parliamentary candidate for his

¹ *Gilpin v Fowler*, 9 Exch. 615. ² *Davis v Snead*, L. R., 5 Q. B. 608. ³ *Laughton v Sodor*, L. R., 4 Priv. C. 495. ⁴ *Macdougall v Claridge*, 1 Camp. 266. ⁵ *Spencer v Ameston*, 1 M. & Rob. 470. ⁶ *Blackham v Pugh*, 2 C. B. 611. ⁷ *Wright v Woodgate*, 2 C. M. & R. 573. ⁸ *Martin v Strong*, 5 A. & E. 538. ⁹ *Spill v Maule*, L. R., 4 Exch. 232. ¹⁰ *Harris v Thompson*, 13 C. B. 333.

district, though he might communicate his statement to other voters;¹ nor in an officer of the navy writing to Lloyd's imputing misconduct to a captain of a transport ship.² Where a wife advertised a reward for evidence of a previous marriage of her husband, the inference being that he was suspected of bigamy, this was held a privileged publication on the part of the publisher of a newspaper as being merely a mode of procuring evidence of a fact in which she was interested;³ though subsequent judges discredited such a decision on the ground that a wife had no such substantial interest as that suggested.⁴ And it has been held justifiable to publish an advertisement, offering a reward for information enabling a sheriff's officer to take a person into custody.⁵

Sometimes a publication may be justified on the ground of self-defence, provided the latter ground is not exceeded. Thus where a shareholder had published a pamphlet insinuating fraud in the directors, the latter were held justified in publishing a reply, though such reply contained libellous allegations against the shareholder who attacked them.⁶ In one case, where all that was required was simply to deny the plaintiff's assertion, the defendant, not content with that, went on to add, that such assertion was a mean and dishonest attempt to defraud the defendant; this was held to be an abuse of the privilege.⁷ In short the general rule which is applicable to all attacks upon others in self-defence applies equally to occasions in which one has libelled another in defence of his own interests and friendships, namely, that it must be reasonably pertinent to such defence, and neither exaggerated nor reckless in its insinuations, though mistaken.⁸

A privileged occasion must not be abused to cloak malice.—Thus while the law excuses a man for preferring his own interest to that of his neighbour, it exacts a strict account of any excessive or reckless disregard of that

¹ *Duncombe v Daniel*, 8 C. & P. 222. ² *Harwood v Green*, 3 C. & P. 141. ³ *Delany v Jones*, 4 Esp. 191. ⁴ *Lay v Lawson*, 4 A. & E. 795. ⁵ *Ibid.* ⁶ *Koenig v Ritchie*, 3 F. & F. 413; *R. v Veley*, 4 F. & F. 1117; *Lawless v Anglo-Egypt. Co., L. R.*, 4 Q. B. 262. ⁷ *Tuson v Evans*, 12 A. & E. 733. ⁸ *Wright v Woodgate*, 2 C. M. & R. 573; *Cooke v Wildes*, 5 E. & B. 335; *Toogood v Spyring*, 1 C. M. & R. 194.

neighbour's rights, even though selfish purposes are justly deemed superior. Malice and spite are to be distinguished from a sober, rational, and steady regard to one's private interests; and whenever it can be seen, that this selfish object was not solely and reasonably kept in view, but spite and malice were mixed up with it, then the privilege is lost and the libel remains without excuse. Thus where a letter or private communication might have been privileged, it is otherwise when the contents are put in a telegram and so published.¹ But where the occasion is privileged, it is for the plaintiff to make out that the defendant either knowingly or from some indirect motive made a false or reckless statement; and if he had an honest belief, that the statements were true, though in fact he had no reasonable grounds for such belief, he will be within the protection of the privilege.² In such cases a twofold inquiry is demanded. It is exclusively for the judge to say, whether there is in the circumstances a fair basis for the privilege claimed.³ And it is equally for the jury exclusively to say, whether that privilege was exceeded, and spite and malice governed the slanderous or libellous act.⁴

Libellous complaints to official superiors of a party.

—When the libel relates to some public official, and is contained in a letter to a Secretary of State or other high officer, and so the document is privileged, an action can seldom be maintained, because the libel cannot be got at. The Secretary of State is not compellable to produce it, nor will secondary evidence be admitted of the contents.⁵ Nevertheless when an opportunity occurs of obtaining knowledge of those communications, if there is a basis of interest and a fair and temperate complaint, this is a privileged communication. Thus it is, if one complains to a proper authority for redress of some wrong suffered by

¹ *Williamson v Freer*, L. R., 9 C. P. 393. ² *Clark v Molyneux*, 3 Q. B. D. 237; *Spill v Maule*, L. R., 4 Exch. 235. ³ *Taylor v Hawkins*, 16 Q. B. 321; *Whiteley v Adams*, 15 C. B., N. S. 392.

⁴ *Ibid.* *Cooke v Wildes*, 5 E. & B. 335. The point has been raised whether, if the libel is sent to a wrong person, the privilege, if applying to the right person, would extend to this.—*Harrison v Bush*, 5 E. & B. 350.

⁵ *Anderson v Hamilton*, 2 B. & B. 157n; 8 Price, 244n; *Stace v Griffith*, L. R., 2 Priv. C. 428.

the complainant.¹ As where an inhabitant addressed a complaint about a magistrate of his district to the Lord Chancellor or Home Secretary as to the conduct of such magistrate.² A creditor of an officer in the army honestly represented his misconduct as to bill transactions to the Secretary at War and expecting redress; and he was held privileged.³ And so was a parishioner writing to his bishop as to the incumbent's conduct.⁴ In such a case the fact that the complaining party mistook the powers of the quarter addressed by him will not prevent the privilege attaching, if the mistake was not unreasonable.⁵ In such official reports by public officers to their superiors, however, a libel will not be privileged, unless it be relevant to the subject-matter, and be honestly believed to result by way of fair comment on the facts; as when a clerk of peace complains to justices about the accounts relating to county business.⁶

The cases of communications between military men in course of their duty are also privileged; and even though it is alleged, that an officer has maliciously reported of another officer something which was properly relating to the subject matter, the report will give rise to no action, for no action can lie against a man for maliciously doing his duty. In this respect a military officer stands in the same situation as a judge, and his duties are too delicate and onerous to admit of his being harassed by actions. As was said by Lord Mansfield C. J. and Lord Loughborough, "commanders in a day of battle must act upon delicate suspicions, upon the evidence of their own eyes; they must give desperate commands; they must require instantaneous obedience. In case of a general misbehaviour, they may be forced to suspend several officers and put others in their places. A military tribunal is capable of feeling all these circumstances and understanding that the first, second, and third part of a soldier is obedience. But what condition will a commander be in, if, upon the exercising of his authority, he is liable to be tried by a common law judicature. If such an action

¹ *Woodward v Landon*, 6 C. & P. 548. ² *Harrison v Bush*, 5 E. & B. 344. ³ *Fairman v Ives*, 5 B. & Ald. 644. ⁴ *James v Boston*, 2 C. & K. 8. ⁵ *Fairman v Ives*, 5 B. & Ald. 644; *Harrison v Bush*, 5 E. & B. 344. ⁶ *Cooke v Wildes*, 5 E. & B. 340.

is admitted every acquittal before a court martial will produce one.”¹

Excuse of slander or libel in judicial proceeding.—

It has been seen, that one of the primary rights of the subject is to be present in courts of justice and to publish the proceedings, as having an interest, common to all, in what is done in such courts. These proceedings being undertaken either from a sense of public duty or strong personal interest, the statements made in the ordinary course of such proceedings are *prima facie* privileged, and no action lies for slander or libel published, if it is pertinent to the matter. Thus it is with a charge of felony honestly made to a constable or justice,² or a charge of perjury made by a parishioner to justices against a constable about to be elected by his vestry.³ And a counsel or advocate conducting a cause in court is exempt from liability for comments and insinuations against third parties, if these are relevant.⁴ And allegations in course of the pleadings in suits or in the affidavits relating thereto, and by witnesses, are all privileged from action,⁵ even though malice is alleged against the witness.⁶ If the moment the witness swerves from the truth an action were to lie against him at the suit of the party injured, this would be convicting a man of a crime of which he could not be convicted in a court of criminal jurisdiction without the concurring testimony of two. It might be different indeed, if the process of the court were abused maliciously, and without reasonable or probable cause.⁷ The great object of the law is to allow witnesses to speak freely without fear of consequences.⁸ Therefore when a witness gave an answer which was not relevant yet had reference to the inquiry, and was in supposed vindication of his own character, it was held not actionable as slander.⁹

It was long thought doubtful, whether a judge might not be liable for words spoken in course of his judgment

¹ Sutton *v* Johnstone, 1 T. R. 549. Dawkins *v* Paulett, 9 B. & S. 768; L. R., 5 Q. B. 904; L. R., 7 H. L. 744. ² Padmore *v* Laurence, 11 A. & E. 382. ³ Kershaw *v* Bailey, 1 Exch. 743. ⁴ Hodgson *v* Scarlett, 1 B. & Ald. 244; Mackay *v* Ford, 5 H. & N. 792. ⁵ Revis *v* Smith, 18 C. B. 126. ⁶ Dawkins *v* Rokeby, L. R., 7 H. L. 754. ⁷ Revis *v* Smith, 18 C. B. 140. ⁸ Henderson *v* Broomhead, 4 H. & N. 569. ⁹ Seaman *v* Netherclift, 2 C. P. Div. 56.

or on the hearing, which were not pertinent or were said maliciously and without probable cause. Thus it was said by a judge in 1842 :—"I have no doubt in my mind that a magistrate, be he the highest in the land, is answerable in damages for slanderous language, either not relevant to the cause before him or uttered after the cause is at an end ; but for words uttered in the course of his duty no magistrate is answerable either civilly or criminally, unless express malice and the absence of reasonable and probable cause be established."¹ But on further examination it was made clear, that, no matter what is the allegation as to motive or reasonable or probable cause, no action will lie against a judge, including a county court judge, for words spoken in course of his duty. The reasons given are, that "the provision of the law is, that judges should be permitted to administer that law with independence and without fear of consequences. How could a judge so exercise his office, if he were in daily and hourly dread of an action being brought against him, and of having the question submitted to inquiry, whether a matter on which he had commented judicially was or was not relevant to the case before him ? Again if a question arose as to the *bona fides* of the judge, it would have, if the analogy of similar cases is to be followed, to be submitted to a jury."² In such cases there is no remedy but to apply to the usual quarter for removing a corrupt or incompetent judge, which is done by resorting to Parliament as to the judges of the High Court, and to the Lord Chancellor as to county court judges and justices of the peace. For though judges are privileged from actions for mistakes in law and for libellous words used in judicial matters, they are not exempt from other punishment for corruption or gross misbehaviour in their office ; as was seen in the notable cases of Bacon and Macclesfield and some recent judges of inferior degree.³ And for misconduct out of their office, as for libel, they are amenable to the ordinary remedies.⁴

¹ *L. Denman, C. J.*, *Kendillon v Maltby*, Car. & M. 409. See also per *Cockburn C. J.*, in *Thomas v Churton*, 2 B. & S. 479. See also *Fray v Blackburn*, 3 B. & S. 576.

² *Scott v Stansfield*, L. R., 3 Exch. 220. ³ *R. v L. Bacon*, 2 St. Tr. 1087 ; *R. v L. Macclesfield*, 16 St. Tr. 767 ; *Exp. Ramshay*, 18 Q. B. 173 ; *R. v Badger*, 4 Q. B. 468.

⁴ *Re Justice Johnson*, 29 St. Tr. 81. "It is not to be supposed

Excusable slanders by justices of the peace and others.

—The same rule applies for the protection of justices of the peace, who, when they act in the course of their duties judicially are not liable for words spoken against third parties or the parties concerned, whether malicious or not. But their acts may sometimes be redressed in another way, at least as against a defendant, by an action on the case, should their judgment be acted on, if it is done maliciously and without reasonable or probable cause.¹ And if the judgment is without jurisdiction, as where the justice without any evidence wilfully and maliciously convicts a person brought before him, an action would lie against the justice;² for, when the conviction is quashed, the justice would have no means of defending himself. A coroner is also privileged in his address to the jury—at least if there is reasonable and probable cause for what he says.³ And there seems no reason why he should not have the same immunity as other judges; seeing that there is a remedy also for misconduct.⁴

Excuse of libel in publishing speech delivered in Parliament.—Notwithstanding that it is settled, as already stated,⁵ that a third party may with impunity publish debates and proceedings in Parliament, though these may be libellous to individuals therein described, yet the question has been raised, whether a member of Parliament who himself publishes a speech which he has delivered in Parliament, and which contains libellous matter, escapes all liability to the person libelled. In one

beforehand that those, who are selected for the administration of justice, will make an ill use of the authority vested in them. Even inferior justices and those not of record cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction. In the imperfection of human nature, it is better even that an individual should occasionally suffer a wrong, than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter, so also are neglect of duty and misconduct in it. For these there is, and always will be, some due course of punishment by public prosecution.”—*Lord Tenterden, C. J., Garnett v Ferrand, 6 B. & C. 626.*

¹ 11 & 12 Vic. c. 44, § 1.² *Gelen v Hall*, 2 H. & N. 393.³ *Thomas v Churton*, 2 B. & S. 475.⁴ *Garnett v Ferrand*,

6 B. & C. 625.

⁵ *Ante*, p. 117.

instance a peer had in the House of Lords delivered a speech defamatory of a solicitor and then published such speech; whereupon the solicitor sued the publisher, and the judge directed a jury, that the publisher was liable, if the object of the peer delivering it was merely to make the speech a vehicle of the libel.¹ And again, a member of the House of Commons sent a copy of his speech to a newspaper editor, requesting it to be published on the alleged ground, that incorrect copies had already appeared, and it contained libellous attacks on a third party, who sought redress against the member. The court held, that if a jury found the motive of publication was rather to circulate the libel as a libel, than to promote the public good by issuing a correct version of the speech, he was liable to the ordinary remedies against libel, for he was acting on his own responsibility out of the course and order of Parliament.² Nevertheless, if the object of a member of the House of Commons is to inform his constituents correctly of what he has done, and of this speech as part of his conduct, it can scarcely be doubted, that he is as much exempt as a stranger would be, who made it a business to publish correct reports, and who is now admittedly exempt from legal liability, though the character of individuals be thereby unavoidably injured.¹ And though a member of the House of Commons in one respect has his constituents as interested parties to watch his conduct over and above his duty to the nation, yet this last reason is enough to protect him; and therefore the same rule will apply to a member of the House of Lords as to a member of the House of Commons. This is only in harmony with the general rule, that if any person publish a report of what takes place in Parliament at a time when the public are admitted and the report is fair, he is not liable in an action at the suit of any person who happens to be affected by something libellous in such report. The reason is, such reports are part of the ordinary business of Parliamentary life, and whatever injury is necessarily caused by the pursuit of that business is unavoidable, and gives no cause of

¹ (A.D. 1794) *R. v Abingdon*, 1 Esp. 226. ² (A.D. 1813) *R. v Creevy*, 1 M. & S. 273. ³ See *Davidson v Duncan*, 7 E. & B. 233; *Wason v Walter*, L. R., 4 Q. B. 95.

action, because no blame is imputable to the reporter, or to the publisher, or to the author.¹

Excuse of libel in publishing Parliamentary papers.

—How far a parliamentary paper, that is to say, a document submitted to the Parliament and ordered to be printed and published for the public benefit, may be published with impunity by strangers, though the contents may be libellous to individuals, long caused doubt to the courts, and gave rise to something approaching a conflict between them and the Parliament. This question differs somewhat from that which was involved in the case of insults and contempts committed by third parties against Parliament, and the mode of treating which, though sometimes causing difficulty, led to no apparent direct conflict.² In this case it is the House itself which causes the act to be done by one of its officers or under its direct authority, and therefore must needs protect these parties if it is able to do so. Of the exercise of this jurisdiction of Parliament to protect its servants, the courts of law have occasionally shown great jealousy. Holt, C. J. is reported to have said, that “the House of Commons kept a hawk in the shape of their sergeant whom they were obliged to gratify by flying him forth to take his prey from time to time.” In 1686 when Williams, Speaker of the House of Commons, was sued for libel for publishing a paper called Dangerfield’s narrative, which was part of the proceedings of the House and directed by the House to be published, the court overruled his defence as idle and insignificant; and the chief justice of that day observed, that no order of the House could justify a scandalous, infamous, and flagitious libel. The defendant was fined 10,000*l*.³ Such a decision as that, however, later judges have treated as of no authority, and it was reversed by act of Parliament.⁴ At a later date, where Wright, a volunteer, published a true copy of a report of the House of Commons, which had been approved and communicated to the House of Lords, it was held, that he was entitled to do so, and was exempt from liability to a person who conceived that such report imputed high treason to him. The House, it was said, is the guardian of the

¹ *Wason v Walter*, L. R., 4 Q. B. 73. ² See *ante*, p. 109.

³ *R. v Williams*, 13 St. Tr. 1435; 2 Show. 471. ⁴ *Ibid.*; *R. v Wright*, 8 T. R. 293.

liberties of the subject, and no part of its proceedings can be treated as a libel, whatever may be its consequences. If the report were untruly copied it might be otherwise.¹

In one case in 1839, the printers to the House of Commons were sued by Stockdale, the publisher of a book, which book had been represented in the Parliamentary report to be obscene. Thereby a libel was published against him as an individual, being the publisher of such book. The official Parliamentary printers set up as a defence that the document had been ordered by Parliament to be printed and published. And the Court of Queen's Bench held this order of the House to be no defence.² The judgment then being entered for the plaintiff, the sheriff levied its amount with a view to enforce the judgment, when he was met by two difficulties. The House of Commons ordered him to repay the sum to their printer, and ordered him to be committed to prison for breach of privilege until he did so; while at the same time the Court of Queen's Bench, acting on the opposite view, ordered the sheriff as their officer to pay over the very same money to the plaintiff, and ordered the sheriff to be committed till he did so. The sheriff, being first taken into custody under orders of the House, sued out a *habeas corpus*; and at this stage the court held, that it could not release him, since the warrant purported, that the commitment was for a breach of privilege of Parliament.³ There was thus an apparent conflict between those two high courts in dealing with the same subject matter.

Mode in which Parliament protects against courts of law its official papers.—The jurisdiction and power of the Parliament in this matter are of supreme interest and importance. In 1837 the House of Commons passed a resolution, which is sufficiently self-evident, namely, that the publication of reports was an essential incident to the constitutional functions of the House. And another resolution was, that the House has the sole jurisdiction to determine the existence and extent of its privileges, and that the institution of a suit or action is a breach of that privilege.⁴ This practice of the publication of papers so deemed by the House of Commons necessary to the

¹ *R. v Wright*, 8 T. R. 298. ² *Stockdale v Hansard*, 9 A. & E. 1.

³ *Re Sheriff of Middlesex*, 11 A. & E. 273.

discharge of its constitutional functions, had been continued since 1690.¹ And Sir R. Peel said, that slavery would never have been abolished, if the House had not had the power in this way to print and publish the evidence taken before its committees.² Accordingly, when actions are brought against the Speaker, or persons acting under the authority of the House, or against witnesses for evidence given before the Committees of the House, the House will commit the solicitor as well as the plaintiff in any action for presuming to molest its officers.³ The House has moreover repeatedly declared, that it will commit all persons whatever, whether judges, counsel, solicitors, parties, or sheriff, who take part in thus interfering with the exercise of so transcendent a privilege. In 1689 the House of Commons resolved, that judgments given six years before by the Court of Queen's Bench in a certain suit of this description were illegal, and a violation of the privileges of Parliament, and pernicious to the rights of Parliament. Topham was then the sergeant of the House, and had been sued for executing the orders of the House. The two judges who had sat in the court, Sir F. Pemberton and Sir F. Jones, were ordered to attend the bar and explain the reasons of their decision. Those judges did attend, but did not give a satisfactory explanation, and though they represented it as only an error of judgment, they were imprisoned in Newgate (where they remained eight months) for the breach of privilege which they had committed in course of that action.⁴ It was urged, that this doctrine of Parliament enforcing its privilege would virtually prevent any remedy in case of abuse, as when the House commits a member for no real fault, or a fault that might be deemed by a court of law no fault or contempt. But, as already observed, the same argument may be urged against the courts of law which may themselves do a wrong without a remedy. The answer to such objections to both high courts

¹ 38 Parl. Deb. (3) 1114, 1270 ; 48 Ibid. 1192 ; 53 Ibid. 588.

² 51 Parl. Deb. (3) 326. ³ 82 Parl. Deb. (3) 467.

⁴ *Jay v Topham*, 12 St. Tr. 830. In one case of *Bell v Glass*, an action brought in the Court of Requests by a gentleman against an officer of the House of Lords for seizing his umbrella while he attended the debate, the House summoned both the plaintiff and the judge before its bar ; but the action was abandoned without any final decision.—51 *Parl. Deb.* (3) 66.

is, that each must be credited with a sense of justice, and to seek a check upon either is to revert to the apophthegm—*quis custodiet leges?*¹ During the controversy that arose out of the case of Stockdale, which had the effect of making Parliament and the courts of law take up opposite sides, and to act as if they were preparing for extremities, statesmen as well as lawyers were divided as to the correct view. One party urged the committal of the judges, and that nothing short of that course could terminate the issue. The other party confidently predicted disgrace and loss of popularity to the House of Commons, if any such course were resorted to. The subject was thoroughly discussed, and after many fluctuations, the happy thought at last was suggested and adopted of passing a statute, which had the effect of putting an end to the apparent conflict.²

¹ See *ante* p. 108. See also as to mode of commitment, 2 Pat. Com. (Pers.) 251. SIR R. PEEL said, if extremities were resorted to, the military and the *posse comitatus* might be on opposite sides.—67 *Parl. Deb.* (3) 1012.

² "There was no case so extreme, so absurd, so improbable, that might not be imagined for the purpose of affording grounds for taking away any power vested in the House of Commons, the House of Lords, or the Crown. The Crown had the clear right of declaring war against all the powers of Europe to-morrow if it thought fit; but would any one make this very improbable contingency a ground for demanding, that the Crown should be deprived of its right to declare war? There are no means of the House of Commons maintaining its authority, its dignity, its independence, except reserving to itself entire and undiminished the power of declaring, what are its direct constitutional privileges, and by taking care that such a declaration on its part shall be held final and sufficient throughout the empire."—Lord J. Russell, H. C. 48 *Parl. Deb.* (3) 339.

LORD CAMDEN said "the rights of the House of Commons are original and self-created—they are paramount to the jurisdiction of courts of law, and are above the reach of prohibitions, injunctions, or error."—Entineck v Carrington, 19 *St. Tr.* 1030.

PEMBERTON in course of the debates maintained, that the courts of law were the superior power in such a conflict. And SUGDEN urged, that the House of Commons could not commit the judges, owing to the disgrace such a step would involve.—51 *Parl. Deb.* (3) 50.

The division of opinion between the statesmen and lawyers then in Parliament seemed to be as follows. On the side of Parliament: Peel, Lord J. Russell, Palmerston, Lord Stanley, Lord Howick, Campbell, Rolfe, Wilde, Follett, Lushington, O'Connell, Hume. In favour of the courts of law: Pemberton, Sugden, Goulburn, Gladstone, Disraeli, Brougham. On some of the minor incidents one or two of these occasionally changed sides.

Conflict of Courts of Law and Parliament ended by a Statute.—The controversy which ended in this statute was happily deemed a triumph by both the contending parties. It was even in the view of the upholders of Parliamentary privilege necessary if only to give a better remedy, seeing that the House of Commons could only commit during the sitting of Parliament, which was too often an inadequate punishment. In future when the authorised printer of Parliament is proceeded against, it is sufficient, under this statute, for him to give notice to the court or a judge of his authority, and to verify such authority by affidavit, whereupon the proceeding must be finally stayed and suspended.¹ Moreover the same statute entitled strangers, who publish copies of such Parliamentary papers, at any stage to make an affidavit verifying the paper and the correctness of the copy, and the court then is bound to stay all civil and criminal proceedings.² And the statute also protected strangers who published extracts or abstracts of the same papers to this extent, that when proceeded against they have only to show, that these were published *bonâ fide* and without malice, in which event, if the jury agree, the court is bound to enter a verdict of not guilty.³

Excuse of libel in publishing reports of legal proceedings.—The right of any person to publish reports of the proceedings of courts of justice has been seen to be well established; from which also it follows, that when a fair report of a trial in any court of justice is published, such publication is protected from any proceeding, though defamatory. The conspicuous condition of this exemption however is, that the report shall be a fair report. This again implies, that the reporter has no business to state his own or any other person's impression as to the effect of the evidence of a witness, or of the whole evidence, for that is the sole business of the court. Hence when a report stated, "that the jury under the directions of the judge were obliged to give a verdict of acquittal to the great regret of a crowded court, on whom the evidence made a strong impression of the prisoner's guilt," this was deemed an outrageous overstepping of the reporter's function; and

¹ 3 & 4 Vic. c. 9, § 1.² Ibid. § 2.³ Ibid. § 3.

however just and fair such comment may be, it is held certainly libellous, when the reporter thus arrogates to himself the functions of both judge and jury.¹ On the other hand, the reporter may make mistakes without any intention to do so. In such a case the main question always is, whether he exercised reasonable skill and care in the work of reporting, for his vocation cannot be carried on without the usual admixture of error incident to all employments. Honesty of intention and the absence of anything like personal spite and a ready desire to rectify the error are, it is true, not a sufficient defence, for these cannot justify what has actually gone forth as a libellous statement. It is for the jury however always to say, whether the whole taken together is or is not libellous.² The jury have also necessarily to determine, whether it is an exaggerated account intermixed with comments³; and as already stated, though the reporter, like the rest of the community is bound to know what is or is not libellous, and therefore is personally liable, yet in practice the publisher or proprietor of the newspaper, being also liable, is usually selected as the party responsible.

Excuse of libel in publishing reports of public meetings.—The same rule, which exists as to courts of law and as to Parliament, does not however extend to the proceedings of public meetings or rather meetings of persons who discuss topics in which great numbers are interested, and who for the time associate themselves to consider such topics at the same time and place. The following distinctions obviously arise in such a comparison. In courts of law and in Parliament the speakers are men of skill, accustomed to confine their attention to things relevant and to know how to avoid the irrelevant; and the judges and the Speaker of the House of Commons and the Peers are vigilant to repress all things irrelevant, in the course of the discussions. But in public meetings a chairman is taken from the crowd, having often no special knowledge, no special skill in adhering to relevant

¹ *Lewis v Walter*, 4 B. & Ald. 605. ² *Stockdale v Tarte*; 4 A. & E. 1016; *Blake v Stevens*, 4 F. & F. 239; *Chalmers v Payne*, 5 Tyr. 766; *Dicas v Lawson*, 5 Tyr. 769. ³ *Stiles v Nokes*, 7 East, 493; *Lewis v Clement*, 3 B. & Ald. 710; *Andrews v Chapman*, 3 C. & K. 286.

topics, and above all, having by virtue of his position as chairman little or no control over the individuals assembled, and no power of enforcing close attention to the matter in hand. There is little or no self-control as to what is said on the part of each individual singly, or on the part of all collectively; the dignity which sustains habitually elevated functions fails to descend on men who are often biassed by ignorance, passion, suspicion, and a self-delusive zeal. Hence the irrelevant materials often outnumber the relevant, and private character and reputation are the prey of random attacks and of every gust of popular delusion. The discipline of those accustomed to think and reason closely imparts no safeguards against these attacks. And hence it follows, that while the speaker at a public meeting may often escape all liability, owing to the privileged occasions on which he speaks, yet he who puts the words in print and publishes them becomes as much liable as if he originated the whole.¹ Thus at a meeting of local improvement commissioners dealing with ecclesiastical property and the conduct of a chaplain in a cemetery, one of the speakers in the heat of his complaints charged the chaplain with having obtained a bishop's license by misrepresentation. This was published in a newspaper, and being libellous, the court held, that there was no excuse attaching to the publication, and no defence could be set up by the newspaper proprietor.² In like manner a meeting of inhabitants to petition Parliament does not furnish any privilege to publish what was there uttered.³ And no privilege protects the publisher of official papers of local self-governing bodies, even though these are ordered by statute to be kept and sold to all comers, especially if he anticipates the statutory publication—as for example when reports of medical officers to vestries or sanitary authorities are published in a newspaper before the time when the paper would have been issued officially.⁴ The reason is, that before the paper is officially published it may still be corrected. After the paper however has been issued under statutory authority, the privilege protects all who thereafter republish it, for it is then a public document.

¹ 194 Parl. Deb. (3) 1600.

² *Davison v Duncan*, 7 E. & B. 231.

³ *Hearne v Stowell*, 12 A. & E. 719.

⁴ *Popham v Pickburn*, 7 H. & N. 891.

And it is not enough, that a meeting is of public interest and as such a fair matter of comment in a newspaper, as for example a meeting of poor law guardians. For if at such meeting the character of some individual is attacked, and a report of such attack is published in a newspaper, however accurate it may be, there is nothing to exempt the publisher of the newspaper from liability for its libellous character.¹

Slandering from the pulpit.—The question has even been raised, whether a clergyman in preaching or discharging his duties is in any way protected more than his neighbours. The proper function of a priest, or minister of religion of any sect, is to deal with vice or misconduct in an impersonal manner, and therefore he has no privilege while in the pulpit or out of it and is amenable to an action, if he slander or libel any individual in the course of his sermon, address, or circular. He may visit and remonstrate privately with any of his flock, but he exceeds his duty when he takes on himself to put the finger of scorn and denunciation on any individual. He runs the same risk as others of being liable to an action, if he injure private reputation. And, where in one case he denounced by printed circular a parishioner for setting up a school without his leave and warned his flock against sending their children to it, an action was rightly brought.² And where in his sermon he once professed to read a pretended sentence of excommunication against a parishioner and refused to administer the sacrament till he left the church, an action was held rightly brought by such parishioner.³ And yet the charge of a bishop to his clergy has been deemed a privileged communication, especially where he replies to attacks which had been made upon some of his proceedings; it is privileged in the sense, that malice will be *prima facie* rebutted in such a case.⁴

¹ Purcell v Sowler, 2 C. P. Div. 215.
⁹ Exch. 625.

² Gilpin v Fowler,
³ Barnabas v Traunter, 1 Vin. Abr. 396.

⁴ Laughton v Sodor, L. R., 4 Priv. C. 495.

CHAPTER X.

THE REMEDIES FOR LIBEL BY CRIMINAL AND CIVIL PROCEEDINGS.

Remedies for libel.—A libel, like an assault, has this peculiarity, that either a civil or a criminal remedy may be adopted. It is true that blasphemous, immoral, and seditious libels seldom come home to any one individual, being directed against the public generally. In this latter class of cases the criminal remedy is the only one possible, for no individual can show, that he is more injured than his neighbours by the libellous matter. And, as has already been stated, it is in reference to this class of cases, that the Attorney-General usually files an *ex officio* information.¹ But where the libel is defamatory of some individual, the party injured has his choice of either a criminal or a civil remedy. The criminal remedy is either by way of criminal information or by way of indictment. And the civil remedy means an action to recover damages proportioned to the injury sustained. And there are other minor remedies incidental to each of these primary remedies. And not only is a libeller subject to either of these remedies, but he is liable to have both put in operation against him, for there is no power to stop both being, at least, commenced concurrently. Though in one sense they are brought on distinct grounds, and both may be pursued together, yet where both are brought, the court cannot, with accuracy, assign the fittest punishment or a jury the appropriate damages, when the remedy is double. Hence if an action has been brought, and also an indictment or criminal

¹ See *ante*, p. 99.

information, the court will not pass sentence until either the action has been abandoned or concluded, and will suspend sentence till the event be known.¹

Old remedy in Ecclesiastical Court.—It is true that Ecclesiastical Courts could at one time entertain suits for defamation of character in reference to spiritual matters and those only; for if the common law had jurisdiction in respect of the matter, then a prohibition might be obtained to prevent the Ecclesiastical Court entertaining the suit.² The Statute of *circumspecte agatis* recognised this jurisdiction in the Ecclesiastical Courts to deal with defamation, and to punish with penance; but Coke says, that these suits must have concerned merely spiritual matters, such as calling one a heretic, a schismatic, or the like. And even though it was a spiritual matter, still the court could only inflict penance, and could not give damages. For example, to call a prior a rotten churl or a false knave, was no cause for ecclesiastical suit, because it was not spiritual.³ All this jurisdiction of the Ecclesiastical Courts, however, was utterly abolished in 1855.⁴

The remedy by criminal information.—The remedy by *ex officio* information of the Attorney-General has already been considered.⁵ The ordinary remedy of criminal information, though substantially the same in effect as the *ex officio* information, and as an indictment, differs in this respect, that it is granted by the favour of the court, and hence is not granted of course, but requires a preliminary special leave. The court practically confines the remedy to a select class of cases of an urgent kind, the urgency being determined by the character, station, and office of the person libelled, or the peculiar character of the libel itself.

Conditions of granting criminal information for libel.—As to these criminal informations filed by leave of the court, though it has lately been attempted to restrict the exercise of the discretion of the court to a few select

¹ *R. v Mahon*, 4 A. & E. 575. It is said, that the Greenlanders used to allow an injured person to resent his injuries by giving notice that on a given day he would recite to an audience a libel against the wrongdoer, and then it was deemed mean-spirited not to attend and answer it.—1 *Crantz Greenl.* 178.

² *Palmer v Thorpe*, 4 Rep. 315.
Vic. c. 41.

³ 2 Inst. 492.

⁴ 18 & 19

⁵ See *ante*, p. 99.

cases, yet at one time no discrimination was used, and all obtained leave from the clerk of the Crown almost for the asking.¹ This led to frivolous prosecutions, causing great loss and vexation; and in 1693 a Statute was passed, which required leave in open court to be first obtained, and the application must then be made by counsel and supported by affidavits.² One peculiarity of this remedy accordingly is, that the party aggrieved cannot apply in person so as to be his own advocate in such matter, for as the prosecution is in the name of the Crown, only a public officer, or counsel, who is also a kind of officer, is deemed entitled to be heard.³

One condition to be fulfilled by those who seek this remedy is, that the party libelled must make an affidavit that the libel is untrue. Hence, in 1780, when it was imputed to the Duke of Richmond that he treasonably sent intelligence to the French, and he applied for a criminal information, he was required first to deny the truth of the imputation.⁴ In one case the libel was, that the prosecutor ravished a lady by entering her room and personating her husband; and because he only swore that he did not enter her room "against her will," the rule was refused.⁵ But this condition may be dispensed with, when the person libelled is abroad, and his friends move in the matter, or when the libel is against a class of persons, or imputes something so general as not to require contradiction; and it is not indispensable, that the conduct of the applicant should be blameless.⁶ Another condition of this special remedy is, that no unnecessary delay, after knowledge of the libel, shall take place in applying to the court; and two legal terms next following the publication of the libel have been usually given for the application.⁷ Another and important condition is, that the aggrieved party should not have resorted to any other remedy, direct or indirect, as by corresponding with or compounding with his adversary,

¹ *R. v Robinson*, 1 W. Bl. 542.

² 4 & 5 W. & M. c. 18.

³ *R. v Lancashire*, 1 Chitt. 602; *R. v Brice*, 2 B. & Ald. 606.

⁴ *R. v Haswell*, 1 Doug. 387.

⁵ *R. v Wright*, 2 Chitt. 162.

⁶ *R. v Drakard*, 30 St. Tr. 978; *R. v Williams*, 5 B. & Ald. 595; *R. v Gregory*, 8 A. & E. 907.

⁷ *R. v Jollie*, 4 B. & Ad. 869;

R. v Bishop, 5 B. & Ald. 612.

or writing a defence to the newspapers, or retorting in any manner by way of gratifying his revenge or indignation.¹

The court has sometimes tried to lay down a rule as to restricting this remedy according to the subject matter of the libel and the degree of public mischief; but beyond saying, that every common libel is not to be redressed by this special remedy, no precise line has ever been drawn. If the remedy were open to all, the court would practically take on itself the duties of juries and promote endless litigations. It is, nevertheless, in practice confined to libels on persons holding some public position, as magistrates, judges, jurors, and high State officials, whose character and reputation are matter of public concern, and deserve swift and conspicuous redress and protection. When the court has decided, that a criminal information may issue, the prosecutor is bound to enter into his recognisance to prosecute with diligence.² On the other hand the defendant may be served with a subpoena from the Crown Office to enter appearance within four days, or he may be at once apprehended on a judge's warrant, and bound over with sureties to appear and answer the information at a time stated.³

This remedy of criminal information, while subject to some conditions, has, at the same time, some advantages in bringing about an apology at an early stage, though such result is not deemed a meritorious ground for the application. Moreover when the defendant comes to show cause against the information being filed, he may practically get rid of the rule, if he can produce affidavits showing the truth of the libel, for then the question can usually only be satisfactorily disposed of by a jury on an ordinary indictment, and the special remedy will be superfluous.⁴

Indictment for libel and charge before justices.—When the remedy chosen is an ordinary indictment for libel, there is the further choice of proceeding, in the first instance, by summons or warrant before a justice of the peace. As a justice of the peace has jurisdiction to hear all charges for indictable offences, there is no peculiarity in the

¹ *R. v Lawson*, 1 Q. B. 486; *R. v Marshall*, 4 E. & B. 475.

² 4 & 5 W. & M. c. 18, § 2. The security is only 20*l.*, and the court will not order higher security.—*R. v Brook*, 2 T. R. 190.

³ 48 Geo. III. c. 58, § 1. ⁴ *R. v Eve*, 5 A. & E. 780.

proceeding, as regards the preliminary stage in this offence.¹

Preliminary hearing before justices of the peace.—A defendant charged before justices of the peace with an indictable offence may usually make the same defence as if he was on his trial before a jury, unless some Statute restricts it. Yet this amplitude is neither necessary nor proper. All that the justices have to do is to see, that there is a *prima facie* case made out, and it is no part of their business to go minutely into the evidence and weigh the conflicting details, this being the function of the jury assisted by the presiding judge, who alone can do it thoroughly and conclusively. And the defendant is entitled to call witnesses who can give evidence on his behalf.² It is true, that this initiatory stage is often the most attractive feature to prosecutors when they elect a criminal remedy, for they consider the publicity and disgrace of being examined before the committing justice as not only easing the smart of indignation, but in some measure enhancing the punishment. The origin of the jurisdiction of justices to arrest libellers and commit them for trial is somewhat obscure, but on a search made for 120 years before 1820, they had exercised the power, and indeed their commission from the first origin of their office in 34 Edward III. embraced all offences connected with a breach of the peace.³ In case of seditious, immoral, and blasphemous libels, as there is substantially no mode of justifying them, witnesses for the defendant can seldom be of use before the committing justices, except to support the denial of publication. But in case of defamatory libels, the defendant was allowed by Statute to plead the truth of the libel and to call evidence in support of such plea at his trial.⁴ Nevertheless, as this was only an additional plea for use at the trial, and not before it, it has been held that the benefit of witnesses and evidence on the defendant's behalf to support such plea cannot be anticipated at this preliminary hearing; that they must be reserved for the trial alone, and that the justices ought not to admit any such evidence of the

¹ 11 & 12 Vic. c. 42. As to justices' warrants to arrest libellers see 2 Paters. Com. (Pers.) 152. ² 30 & 31 Vic. c. 35. ³ Butt v Conant, 1 B. & B. 571. ⁴ 6 & 7 Vic. c. 96.

defendant at all.¹ Should the justices commit the defendant for trial, the latter has a right to be admitted to bail, and no discretion to refuse moderate bail is given to them.²

In some very aggravated cases the justices however, besides taking bail for the defendant to appear and answer at the trial, or instead of committal for trial, may exact sureties of the peace in the meantime. This is not a matter of course, and is only justifiable if the justices are satisfied, that the libel and the conduct of the defendant are such, that it can be reasonably inferred, that the defendant will assault or threaten the prosecutor in the meantime. And this will probably seldom be made out; nor indeed is any collateral restraint of this kind on the defendant required, when he is once committed for trial, seeing that such committal is itself a binding him over to good behaviour till the trial.³ And justices may in some cases also bind over the defendant to find sureties for good behaviour for a reasonable fixed time.⁴

Arrest of libeller by judge's warrant.—In 1808 power was given to a judge of the Queen's Bench division to issue his warrant to apprehend any person charged with misdemeanour, including libel, and when the party is apprehended and brought before a justice of the peace, the latter may commit the party, in default of two sureties, to appear and answer the charge.⁵ And it was once keenly debated how far it was lawful, before indictment found, to arrest a libeller on the old theory prevalent in the time of the trial of the Seven Bishops, that a libel was a constructive breach of the peace.⁶ But, as already stated, justices, in the ordinary way, may now often apprehend a defendant when the charge of the offence has been made before them.

¹ *R. v Carden*, 4 Q. B. D. 1. ² 11 & 12 Vic. c. 42, § 23.

³ See 1 Pat. Com. (Pers.) 192, 206.

⁴ *Haylock v Spark*, 1 E. & B. 471. When the seven bishops were pressed by James II. to enter into a recognisance, they answered that there was no precedent for a member of the House of Peers being bound in recognisance for a misdemeanour, even if their refusal was a misdemeanour. The LORD CHANCELLOR JEFFREYS said there were precedents for it, but being desired to name one, he named none. The Archbishop thereon declared he had the advice of the best counsel and they had warned him of this.—*Clarend. St. Letters*.

⁵ 48 Geo. III. c. 58, § 1. ⁶ 23 Parl. Deb. 1094; 36 Parl. Deb. 1170; 2 Pat. Com. (Pers.) 152.

Form and trial of the indictment or information for libel.—One rule as to the form of indictment or information has hitherto been, that the very words of the libel must be set out, and not merely their purport, for the court must be able to judge whether the words are libellous, and is not bound to take the prosecutor's construction of them. And if the words are not so set out, then, after verdict of guilty, such verdict will be set aside either in arrest of judgment or on error. Thus, when the defendant had been indicted for an obscene libel contained in a book, but the words of the book were not all set out in the indictment, the court on error reversed the judgment.¹ An indictment for libel cannot be tried at quarter sessions unless the libel is obscene; this rule being laid down by statute probably because such trial frequently involves questions of law of an intricate nature.² And in order to comply with the rule as to indictments requiring to be preferred in the county where the offence is committed, it is held that the place of offence is either the place where the libel was composed with the intent to publish it elsewhere, or the place where it was actually published, and the latter is generally chosen.³ Indeed, it was strenuously urged in the prosecution of Sir F. Burdett, in 1820, that there was no crime till the actual publication, and what preceded that stage was no more indictable or cognisable by the law than the secret thoughts of the mind; and hence that the place of actual publication was the only place where the offence was committed. But the Court held, that the mere composing in one place with an intent to publish in another place, followed up by the actual publication in that other place, rendered the offence indictable in either of the two places.⁴ In ordinary cases the indictment can only be tried at the assizes or the Central Criminal Court, but if a criminal information has issued, or the indictment has been removed by certiorari, then it may be tried in the Queen's Bench division, and with the benefit of a special jury.

How far truth of the libel is a defence in criminal proceedings.—Whether the truth of the libel could formerly be proved in answer to an indictment or criminal

¹ *Bradlaugh v R.*, 3 Q. B. D. 625; *Wright v Clements*, 3 B. & Ald. 503. ² 5 & 6 Vic. c. 38. ³ *R. v Burdett*, 4 B. & Ald. 95. ⁴ *Ibid.*

information has long been disputed. The early statutes as to *scandalum magnatum* seem to have assumed that the libel was false, and the epithet "false" was part of the old description of the offence. The Roman law seemed not clear as to the truth of the libel being any defence. And Hudson took credit for the Star Chamber having discovered the important truth, that a libel is not the less a libel that it is true, as if the doctrine had only been then recently established.¹ Coke also says, that a libeller was not allowed to prove the truth of the libel, because he ought not to have revenged himself against the libelled party in this way, which was like taking the law into his own hands.² Yet Bacon blamed Coke for this doctrine about truth being an inadmissible defence, showing that the doctrine had never been clearly settled.³

The first clear enunciation of the rule has been ascribed to Lord Raymond, C. J. In the case of *R. v Franklin*, part of the defence was, that the libel was not proved to be false. The Attorney-General Yorke said it mattered not whether it was true or false, and that it was for the judge to say if it was a libel, and not for the jury. Lord Raymond, C. J., said

¹ Hudson's Star Ch. c. 11. ² 5 Co. 254.

³ Bac. Letters. The defender of the Star Chamber gave his reasons for this doctrine thus: "As to the gross error that has crept into the world, that it is not a libel if it be true, it hath ever been agreed that it is not the matter but the manner which is punishable. For libelling against a common strumpet is as great an offence as against an honest woman, and perhaps more dangerous to the breach of the peace. For as the woman said she would never grieve to have been told of her red nose if she had not one indeed, neither is it a ground to examine the truth or falsehood of a libel, because it is *sub judice*, whether it be a libel or not. For that takes away *subjectum questionis*, and determines it to be no libel by admitting the defendant to prove the truth, and the defendant in that case ought to plead a justification and demur in law; but if he pleads not guilty, the question is gone whether it be a libel or not."—*Hudson's Star Ch.* p. ii. c. 11. In the Seven Bishops case, POWELL, J., and HOLLOWAY, J., held that falsehood was a necessary ingredient of a libel; and so HOLT has said. But at the date of Fox's bill the judges gave their opinion, that falsehood was not necessary to be alleged.—*19 Parl. Deb.* 599. LORD MANSFIELD, C. J., said in 1770 that the word "false" had been for many years left out in the information as being superfluous. *R. v Almon*, 20 *St. Tr.* 837. It was said that Lord Mansfield was not quite accurate, as the word was inserted at least in *R. v Owen*, 18 *St. Tr.* 1203 (A.D.) 1752.

the jury had only to be satisfied that the publication was in fact made; and that the innuendoes were proved; but as to the writing being a libel, it was for the judge alone, as a matter of law, and if he went wrong on the law, the court could correct him. The jury, in that case, found a verdict of guilty of publishing the libel.¹ In a case of 1789, the judges were consulted, and all held, that the truth of a libel was not to be left to the jury on the trial of an indictment or information; that that doctrine was firmly settled, and was essential to the good order of society. That the word "false" was found in all the ancient forms of informations and indictments, but that that word was applicable not to the propositions contained in the paper, but to the aggregate criminal result, just as the words "false traitor" were always used. That the information would be good without the use of the word "false," which was a merely formal epithet. A criminal intention need not be proved, except where a special statute requires it, for a libel is a firebrand, and he who scatters it scatters death.²

Whatever may have been the time when truth ceased to be allowed as a defence to a criminal proceeding, its sound policy, as the general rule, has been vindicated. The reason given is, that if the truth of a libel were a defence, it would cause the prosecutor to explain away points in his former history, which had long been forgotten and should not be revived, and the knowledge of which could be of no possible use except to rake up old scandals and gratify the malignity of some personal enemy.³

Defence of publication by reason of public benefit.—A new defence not known to the common law, but of great importance in a free country, where the discussion of every subject interesting to one's fellow-citizens is part of daily

¹ It appeared from the case of *R. v Perry*, 5 T. R. 454, that a rule to set aside the verdict in Franklin's case was discharged. The defendant was sentenced to pay a fine of 100*l.*, to be imprisoned for one year, and to find surety for good behaviour for seven years (himself and two others).—*R. v Franklin*, 17 St. Tr. 676. In a case in 1735 of *R. v Zenger*, 17 St. Tr. 678, another attempt was made to prove the truth of the libel, and the court of New York (which professed to administer English law) declared that the truth could not be allowed to be proved. The jury in that case took the matter into their own hands, and found the prisoner not guilty.

² *R. v Stockdale*, 22 St. Tr. 302.

³ 34 Parl. Hist. 392.

life, was introduced in 1843 by the Libel act. It is true that the defence is only allowed in criminal proceedings for a defamatory libel, but as these often nearly touch the liberties of all, this is a substantial boon; and moreover, in civil actions, the same defence is practically open under another name—that of justification on the ground that the libel was true.¹ This is the kind of defence which often arises when newspaper attacks upon character are complained of, and the main difficulty is, whether the whole scope of the article or comment is to impute some conduct which, if true, would injure private character. The defence is, that on any trial of an indictment or information for a defamatory libel, the defendant may plead, that the publication of the alleged libel was true, and was for the public benefit. In order to know how far this defence may be urged, it is necessary to decide what is a defamatory libel; because the defence is only allowed in such a case. And a defamatory libel, as already noticed, does not include a seditious, blasphemous, or obscene libel. Another peculiarity relating to the justification of the truth of a libel is, that, as it is seldom confined to one fact but to several, the whole of the main facts must be stated in the pleading, so as to let the adversary know in time, and be prepared to disprove them; and the whole must also be proved, as it is not enough to prove only a few of the imputations. And while in civil actions a partial justification is no defence, yet it sometimes mitigates damages; so in criminal proceedings a like partial justification may be taken into consideration in mitigating the punishment, though sometimes it has the contrary effect also of aggravating it.²

Effect of not contradicting or promptly prosecuting defamation.—Another circumstance sometimes met with among the defences of those charged with criminal proceedings for defamation is, that the person defamed has long known of the imputation, and has not hitherto contradicted or refuted it; in other words, it is urged that silence under calumny implies consent, and implies an admission that the libel is true. This is a common weapon of defence, highly prized and daily used among

¹ 6 & 7 Vic. c. 96.

² R. v Newman. 1 E. & B. 559.

all unscrupulous champions in political warfare. Courts of law have, however, refused in this matter to set up a rule in open conflict with higher rules of conduct. It was laid down by the court on the trial of Dr. Newman for libelling Dr. Achilli, that silence under the foulest imputations is no legal proof, nor even admissible evidence of the truth of the matter imputed.¹ Courts will not allow a lying calumny to be published, even though it has been published over and over before; and as to which, all that can be said in its favour is, that the calumniator had not yet been suitably punished.

Functions of juries in deciding in libel cases.—However difficult it is to define a libel, especially one alleged to be seditious or blasphemous, it might have been expected, that, when all the facts came to be explained and every view presented and discussed, a jury would be able to relieve judges from any further trouble. But owing to a course of practice which was said, in 1782, to have been pretty uniform since the Revolution, judges had come to regard juries as having no other function except to decide whether the piece of paper containing the alleged libel was in point of fact published; and if this was decided in the affirmative, the judges took on themselves to do the rest and say whether the defendant was guilty or not guilty, thereby exclusively determining not only the construction and effect of the words used, but the intention of the libeller. The opinions of lawyers and leading statesmen were divided as to the correct doctrine on this subject, the majority of lawyers perhaps defending the Court, and the majority of leading statesmen clearly impugning it. It was contended by Erskine, that the obnoxious doctrine had been introduced in 1731, in the time of Lord Raymond, C. J., and had been held pretty uniformly for sixty years, while Lord Mansfield, C. J., and the judges said it had been so held since the Revolution. Burke said, that such a doctrine, whensoever introduced, tended to annihilate the benefit of trial by jury.²

Nature of the contention as to judges' ruling before Fox's Act.—This dispute between judges and statesmen, so memorable a century ago, and even yet wholesome to

¹ R. v Newman, 1 E. & B. 558.

² Burke, Lett. on Libel.

investigate, arose in the following manner. In the trial of the Dean of St. Asaph, Buller, J., the presiding judge, held that all the judges since the Revolution had, in criminal trials for sedition and libel, put the questions to the jury thus:—1. Whether the defendant is guilty of publishing the libel; 2. whether the innuendoes or averments are true; 3. whether it is a libel or not. The two first were for the jury; the last for the judge. If the defendant disputed that it was a libel, he ought to demur to the indictment.¹ Erskine's whole contention for the defendant in that and other cases was, that the words, where no individual's reputation was concerned, could not be known to be libellous till all the surrounding circumstances were proved, and that none but the jury were capable of saying whether, when so explained, the words were libellous; for they might be either dangerously wicked and seditious, or innocent and highly meritorious, when these circumstances were taken into connection with the words used. On the other hand Lord Mansfield and the majority of the judges answered, that when the words, taken apart from all explanation, were read by the judge and deemed by him libellous, they were an offence *per se*, and all the surrounding circumstances, when shown, were at most mere matter of excuse with which the jury had nothing to do. This mode of viewing the functions of juries obviously assumed—1, that a libel consisted of the words without any context or surrounding circumstances; and 2, that a libel was a constructive breach of the peace and illegal *per se*. A libel, however, cannot be viewed as necessarily a breach of the peace, and therefore as necessarily illegal *per se*; and if so, it cannot be known by any person whether the words amount to a libel, till the context and surrounding facts are known and considered at the same time. In short, Erskine contended, that libel, that is to say, a series of words, cannot, any more than a blow on the body, be pronounced an offence *per se*, or a breach of the peace, until the facts are known which surround the uttering and show the intention. A blow may be shown to be in self-defence or given to prevent some other crime; and so words uttered may be, according to the object and intention, the time, the

¹ R. v Dean of St. Asaph, 21 St. Tr. 847.

place, the manner, and all the circumstances, meritorious and appropriate. The mere words and the mere blow thus cannot be taken *per se* apart from their surrounding circumstances, and none but a jury can pronounce conclusively whether an offence has been committed or not.

Unsatisfactory state of law before Fox's Act.—The origin of this conspicuous failure of justice, to which the law of libel was brought, has indeed never been satisfactorily explained. Dunning, Wedderburn, and Glynn, reviewed the older cases, and contended that there was no sound legal authority for such an alleged usurpation on the province of the jury.¹ When consulted on Fox's Bill, the judges admitted, that it was in the power of the jury to find a verdict of not guilty.² And in several cases³ the jury insisted on finding a verdict of not guilty, notwithstanding the judge's direction. And Lord Loughborough said, when law and fact were blended, it had always been the undoubted right of the jury to decide.⁴ And of the same opinion was Lord Camden.⁵ Whatever the preponderance of legal authority had been before, the issue came to be, whether the intention and meaning of the libel was a question of fact or a question of law; and in the end the legislature, by Fox's Act, declared that in future it must be treated as a question of fact and left to the jury. That the law could not be left as it had been for many years before, came to be widely felt by all the leading statesmen during the contests of Erskine as the champion of the liberty of the press. On this state of things Wedderburn observed, a century ago, as follows:—"While matters continue on their present footing, while judges think the intention a matter of law cognizable only by them, and juries imagine this to be an encroachment on their jurisdiction, they will be eternally at variance. Juries thinking law and liberty to be at stake, and judges standing up for their own authority and what they consider the cause of order, neither will give up the contest till the land become one scene of anarchy and misrule. The most audacious libellers, secure in the opposition of juries,

¹ 16 Parl. Hist. 1279. ² 20 Parl. Hist. 564. ³ Bushell's case, 6 St. Tr. 467; The Seven Bishops' case, 12 St. Tr. 183; Owen's case, 18 St. Tr. 1203; and Woodfall's case, 20 St. Tr. 870.

⁴ 29 Parl. Hist. 1297. ⁵ Ibid. 729.

laugh at all the terrors of *ex officio* informations. The Attorney-General, with all his power, is despised. Like an old worn-out scarecrow in a field, his head is made a roosting place, or something worse, by these obscene birds. It is time for us to reconcile the practice of the law with the principles of the Constitution.”¹

Modern practice since Fox's Act as to function of juries in libel cases.—It is now, however, of little consequence to trace how the doctrine arose which gave rise to Fox's Act. Lord Mansfield, C. J., in the considered judgment in 1770, seemed to assume that the libel, that is to say, that the form of words was *per se* unlawful, and this

¹ *Wedderburn, M.P.*, 16 *Parl. Hist.* 1294. BURKE said that he could only account for the doctrine of the judges by supposing, that the Star Chamber had borrowed the doctrine from the Roman law, and that when the Star Chamber fell, the disembodied spirit migrated into Westminster Hall and long kept up its unhallowed work.—17 *Parl. Hist.* 47. “The monstrous absurdity, the glaring iniquity of the judges' doctrine as to libels, is so plain, so palpable, that it may be safely left to the common sense, to the feelings and heads of mankind.”—*Per Serjt. Glynn, M.P.*, 16 *Parl. Hist.* 1141.

On the other hand, it was urged in defence of the judges: “The construction of libels belongs by law and precedent to the judge and not to the jury, because it is a point of law of which they are not qualified to judge. Without such a rule all would be confusion, contradiction, and absurdity. The law would, like Joseph's coat, become nothing but a ridiculous patchwork of many shreds and many colours—a mere sick man's dream without coherence, without order—a wild chaos of jarring and heterogeneous principles, which would deviate farther and farther from harmony.”—*Sol.-Gen. Thurlow*, 16 *Parl. Hist.* 1146.

Lord Camden was entitled to the chief credit of Fox's Act, as he had taken up the subject before Erskine, and adhered to it to the last. It took twenty years to pass Fox's act, and it passed in 1792. LORD BATHURST, Ex-Chancellor, protested against it as completely taking away the rights of judges. And he and LORDS THURLOW and KENYON solemnly recorded their protest, that it would prove the confusion and destruction of the law of England.—29 *Parl. Hist.* 550, 581.

ERSKINE said that “the doctrine of the judges was too absurd to be acted upon—too distorted in principle to admit of consistency in practice—it was contraband in law, and could only be smuggled by those who introduced it—it required great talents and great address to hide its deformity; in vulgar hands it became contemptible.”—1 *Ersk. Sp.* 343. LORD MANSFIELD, on the other hand, said that “all this jealousy of leaving the law to the court as in other cases, so in the case of libels, was in the present state of things puerile rant and declamation.”—*Ibid.* 379.

may have been on the hypothesis that all words *primâ facie* libellous were *per se* a constructive breach of the peace.¹ For this last was apparently once a current assumption as to libel, till Lord Camden's review of the law, and even to a still later date.² But Fox's libel act, in 1792, expressly laid down the rule, that on the trial of an indictment or information for libel, the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue, and were not bound to confine their verdict to mere proof of publication.³ While at the same time it declared, that the judge shall in his discretion give his opinion and direction to the jury on the matter in issue as in other criminal cases.⁴ The effect of Fox's Act as to the part played by a jury in all indictments for libel has been sometimes described as this, that nothing is punished criminally as a libel, unless in the opinion of twelve honest independent and intelligent men it is mischievous, and ought to be punished.⁵ And thus it is seen how important is the part which juries play in the administration of the law of libel.⁶

¹ *R. v Woodfall*, 20 St. Tr. 919. ² See 1 Pat. Com. (Pers.) 192. See also *ante*, p. 148. ³ 32 Geo. III. c. 60. ⁴ *Ibid.* § 2.

⁵ *L. Kenyon, R. v Cuthell*, 27 St. Tr. 675, quoted *ante*, p. 81. ⁶ Campbell's L. Ch., 350.

⁶ "Speaking to a jury is in a manner speaking to the nation at large and flying for sanctuary to its universal justice."—*Ersk. Sp.*

"If juries are fallible, to what other tribunal shall we appeal?"—*Junius*.

"Libel is founded entirely on public opinion. There is no other standard by which it can be measured or ascertained. Who then so proper as the people to determine the point?"—*Wedderburn, M.P.* 16 *Parl. Hist.* 1294.

"Who shall have the care of the liberty of the press—the judges or the people of England? The jury are the people of England. The judges are independent men! Be it so. But are they totally beyond the possibility of corruption from the Crown? Is it impossible to show them favour in any way whatever? The truth is, they possibly may be corrupted—juries never can! What would be the effect of giving judges the whole control of the press? Nothing would appear that could be disagreeable to the Government. As well might an act of Parliament pass that nothing shall be printed or published but panegyrics on ministers. In the full catalogue of crimes there is not one so fit to be determined by a jury as libel."—*Lord Camden*, 29 *Parl. Hist.* 1404.

"Reliance can be placed on the moderation and good sense of juries, popular in their origin, popular in their feelings, popular in

Function of judge on criminal trial for libel.—Now that Fox's Act has decided that both fact and law must be left to the jury on the issue of guilty or not guilty, in criminal proceedings for libel, the chief point left to the judge by that Act was, how far he should state his own opinion to the jury. Lord Kenyon, C. J., said he was commanded by the Libel Act to state to juries what his opinion was as to the alleged libellous paper; and he gave his opinion in one case that it was a libel, but the jury found that it was not.¹ And his practice was always to state his own opinion in such cases; and so it was the practice of Lord Ellenborough, C. J., the next judge in succession, as he told Hone on his trial.² He said such had been the law before Fox's Act, as to the duty of judges, and that Act made no difference in the matter. And Lord Campbell said, that other judges took the same view of their duty.³

But modern judges act otherwise. The rule followed by judges in other criminal cases is for the judge not to give his opinion on the very same matter as that on which the jury are required to give theirs. He explains collateral matters, strips the evidence of what is inadmissible and irrelevant, but he refrains from giving his individual opinion as to guilt or innocence, for that would be to influence the jury and prejudice their minds. And this view is taken in harmony with the spirit of Fox's Act, in apportioning the duty between the judge and the jury.⁴

Finality of verdict of jury on indictment.—Though in civil actions the verdict of a jury may be set aside as in other cases for misdirection and other contingencies, it is

their very prejudices, taken from the mass of the people and immediately returning to that mass again."—*Sir J. Mackintosh*, *R. v Peltier*, 28 St. Tr. 529.

¹ *R. v Perry*, 22 St. Tr. 953.

² *Hone's Trial*.

³ 3 Camp. C. JJs. 51.

⁴ *Baylis v Lawrence*, 11 A. & E. 920. "It has been the course for a long time for a judge in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say whether the facts necessary to constitute that offence are proved to their satisfaction, and that whether the libel is the subject of a criminal prosecution or civil action."—*Parniter v Coupland*, 6 M. & W. 198.

LORD DENMAN said, that, when a judge told the jury, that the paper was in point of law a libel, he virtually repealed Fox's Act.—1. *L. Denman*, *Mem.* 200.

different when a criminal trial has taken place on an ordinary indictment at the assizes. In the case of acquittal the rule is well established, that whether there has been misdirection on the part of the judge or any other irregularity, yet if the verdict is one of acquittal, the Court will not open up that verdict, but treat it as final and irreversible, the rule being, that no defendant shall be put in peril twice by a criminal trial for the same cause.¹

If the verdict has been that of "guilty," the main step next open to the defendant is a motion to arrest the judgment, but this is only competent when there is on the face of the record nothing alleged which a court of law can see to be libellous. Thus when the Dean of St. Asaph had been found guilty of a seditious libel, it was shown afterwards that on the face of the record the words were not libellous, and so the defendant had judgment in his favour.² And this arrest of judgment is no bar to a fresh indictment.³ The arrest of judgment in such cases must be moved for before sentence is passed.

But while such is the practice in ordinary indictments, whenever a criminal information has been filed and tried, or the indictment has been previously removed by certiorari into the Queen's Bench division, and there tried also, one advantage is, that a new trial may be moved for on the ground of misdirection and the other grounds available in civil actions.⁴ Nevertheless, no new trial will be granted after a verdict of acquittal.⁵ And one of the peculiarities is, that during this application for a new trial the defendant must be personally in court.⁶ The reason for this is said to be, that the party having been convicted, and so liable to punishment, might otherwise escape.⁷

The punishment of libel.—Though the development of the law of libel has been slow, yet the existence of the crime known by this name had in ancient as well as modern times attracted great attention, and much variety of

¹ *R. v Russell*, 3 E. & B. 942; *R. v Cohen*, 1 Stark. 516. ² *R. v Dean of St. Asaph*, 21 St. Tr. 1043; *Hearne v Stowell*, 12 A. & E. 731. ³ *Winsor v R.*, L. R., 1 Q. B. 395; *Vaux's Case*, 4 Rep. 45.

⁴ *R. v Holt*, 5 T. R. 436; *R. v Newman*, 1 E. & B. 270; *R. v Whitehouse*, Dears. 1; *R. v Fowler*, 4 B. & Ald. 273. ⁵ *R. v Manor*, 4 M. & S. 337; *R. v Sutton*, 5 B. & Ad. 52. ⁶ *R. v Askew*, 3 M. & S. 9; *R. v Fielder*, 2 D. & R. 46. ⁷ *Rowland's Case*, 2 Den. 372.

treatment is observable. The ancients as usual were severe and cruel in their punishments.¹ By the laws of Alfred in cases of public libel, the tongue was cut out, subject to its redemption with the price put on the head.² And the laws of Edgar and Cnut were the same.³ The Star Chamber, besides fine and imprisonment inflicted on infamous libellers and scandalers of the state, the loss of ears; and for false scandal on the judges and on great personages, branding on the face and slitting of the nose.⁴ Coke says, libelling

¹ By the law of Moses, though calumny and false accusations were denounced, it is not clear whether any punishment was inflicted. But the slandered party was held justified in beating the slanderer, provided he did not render him a cripple or kill him; whereas, if the accusation were true, the slanderer could not be punished.—*Michaelis Com. Art.* 291 § 2. *Deut.* xxii. 13, 19. *Exod.* xxii. 28. Among the Gentoos, to accuse a Brahmin of the weightier crimes, subjected the accuser to have his tongue cut out, and a hot iron of ten fingers' breadth thrust into his mouth.—*Gent. Code*, c. 51. The Lydians, according to Coke, bled the slanderer in the tongue and the listener in the ear.—12 *Rep.* 35. By the laws of Athens only penalties were inflicted, and these varied in severity according to the gravity of the imputed offence. Thus, to assert that a soldier threw away his shield involved a penalty of 500 drachmas. By the laws of the Twelve Tables, the penalty of fustigation was imposed on the more atrocious calumniators, and they were incapable of making a will.—xii *Tables*, c. 9. A false witness was thrown from the Tarpeian rock (*A. Gell.* xx), though at a later period the punishment was arbitrary (1, 16 *D. de test.*). In the Roman law there was no distinction between criminal and civil liability—a fine as well as a sum in name of damages, both being competent. And the ground of action was always viewed rather as an insult to the person than a depreciation of the personal estate of the party slandered. CICERO said the Decemvirs made libel a capital offence.—*Aug. Civ. Dei* ix. 6. The Scotch had an iron collar called a branks, attached by a chain to a pillar or tree and fixed round the neck of scolding women, and those convicted of slander and defamation, and a gag entered the mouth and bridled the tongue.—*Burgh Rec. Aberd. and Edin.* 2 *Wilson's Prehist. Ann.* 516, 522.

² Wilk. Leg. Ang. Sax. 41; 2 Inst. 227. ³ *Ibid.*

⁴ Hudson's Star Ch. p. iii. c. 23. In one case where the blasphemous libel consisted "of raising Judaism up from death and forbidding the eating of swine's flesh," Draske the libeller was sentenced by that court to be fed with swine's flesh while in prison.—*Ibid.* p. ii. c. 1. When Sir T. More was Chancellor, he, in the same court, sentenced two publishers of Tindal's Bible to ride round the city with their faces to the horses' tails, wearing papers on their heads, and with some of the books tacked to their gown, which they were ordered to consign to the flames.

and calumnniation is an offence against the law of God. He also mentions as punishments, loss of ears as well as pillory in the case of exorbitant libels against private persons.¹ It appears that the first libeller sentenced to the pillory by the Star Chamber was Baker in 1562.² For a seditious libel against the judges and Privy Council, one Perkins was fined £3,000; and for writing an abusive letter to an earl, the defendant was fined £5,000, besides being ordered to acknowledge on his knees his offence to the king and the lords of the court.³ And Sir W. Williams, Speaker of the House of Commons, was in 1685, for publishing Dangerfield's Narrative by order of the House, fined £10,000 by the Court of Queen's Bench.⁴

As to corporal punishment, the pillory was apparently deemed the appropriate punishment or part of it, and was part of the common law punishment and long practised.⁵ And in 1789 the publisher of the *Times* was ordered for libels on two royal dukes to stand in the pillory at Charing Cross. But it was before that time an unreliable mode of punishment. When Williams, the printer of the *North Briton*, No. 45, was sentenced and put in the pillory, the mob greeted him with acclamations and raised £200 for him on the spot. In 1791 Macdonald A. G. told the House of Commons, that there had been in the preceding 31 years, 70 prosecutions for libel, of which 50 were convictions, and in five cases pillory had been added to imprisonment.⁶ The punishment of pillory was however wholly abolished in 1816.⁷

It is not unusual to suppose, that there is no limit to the discretion of the court as to the extent of the punishment, whether in the amount of the fine or the length of the imprisonment, which may be imposed for libel, such being what is called the punishment at common law.⁸ It is true, that in the case of defamatory libels there is now an extreme limit to imprisonment. For the term has been, since 1843, by statute for such libels expressly limited to one year; except where the defendant publishes the libel knowing it to be false, and in that case to two years.⁹

¹ 5 Rep. 125.² 3 Inst. 220.³ Dig. L. Lib. 109, 114.⁴ R. v Williams, 2 Show. 471.⁵ 5 Co. 125 c.⁶ 29 Parl.

Hist. 586.

⁷ 56 Geo. III. c. 138; 1 Vic. c. 23.⁸ See 2 Pat.

Com. (Pers.) 222.

⁹ 6 & 7 Vic. c. 96, §§ 4, 5.

Mitigation of punishment for libel.—Owing to the indefinite powers of courts to punish, and owing to the peculiar circumstances under which most libels are published and their intimate connection with the motives and conduct of the libeller, great scope is given to the defendant who is found guilty to satisfy the court, that the punishment should be smaller than the court may be inclined to. Hence before sentence the defendant may produce affidavits of all mitigating circumstances, and his counsel may comment on these materials and urge every topic of excuse and palliation; and the prosecutor may do the contrary in his own interest.¹ A usual topic for the defendant to urge is, that after discovering his liability he did all in his power to stop the further mischief, or to retract and apologise, and he may even show, that he was misled and honestly believed at the time that he was right.² And a like latitude is allowed, on the other hand, to the prosecutor to refute all these contentions and suggestions.³

Security for good behaviour part of punishment.—Over and above the proper punishment for libel, it was laid down by the judges when consulted in 1808 by the House of Lords, that on any conviction for misdemeanour the court may not only insist on the defendant after his allotted imprisonment entering into his own recognizances to be of good behaviour for a reasonable time, but also to have two sufficient sureties besides.⁴ This reasonable time has never been defined. Wilkes was ordered to find security for good behaviour for seven years;⁵ and Horne Tooke to find security for three years;⁶ and Lord George Gordon for fourteen years.⁷ And in 1819 the court went the length of fining a man convicted of blasphemous libel a sum of £1,500, also sentencing him to three years' imprisonment, and after that to find sureties for good behaviour for the term of his life.⁸

This recognizance seems to arise out of the old notion

¹ *R. v Bunts*, 2 T. R. 683; *R. v Wilson*, 4 T. R. 487. ² *R. v Halpin*, 9 B. & C. 66; *R. v Newman*, 1 E. & B. 581. ³ *R. v Pinkerton*, 2 East, 357. ⁴ *R. v Hart*, 30 St. Tr. 1131, 1344; 47 Lords J. 271. ⁵ 4 Burr. 2527. ⁶ 20 St. Tr. 788. ⁷ 22 St. Tr. 175. ⁸ *R. v Carlile*, 3 B. & Ald. 167. See generally as to surety for good behaviour.—1 Pat. Com. (Pers.) 203.

that libel was a constructive breach of the peace. Coke says slanderous words are not a breach of the recognizance for good behaviour, for though such words are motives and mediate provocations for breaking the peace, yet they tend not immediately to a breach of the peace like a challenge. Again he says, that the judges resolved, that a *libellus famosus*, that is to say, a published libel, though made only against one individual, excited all those of the same family kindred or society to revenge, and so tended to quarrels and breach of the peace; and if the libel be against a magistrate or other public person, it was a greater offence, for it concerned not only the breach of the peace, but also the scandal of the government. And though the private man or magistrate be dead at the time of the making of the libel, yet it was punishable, for in the one case it stirred up revenge and breach of the peace, and in the other the libeller traduced "the state and government which dies not."¹

But this view, that a libel *per se* is a breach of the peace, or tends to a breach of the peace, is obviously incorrect as a matter of fact, and no rule of law can alter the fact.² Many libels in no way operate as a breach of the peace, and it would be idle so to regard them. Nevertheless this ancient doctrine was probably at the root of

¹ 5 Rep. 125. A libel has often been said to be indictable because it tends to a breach of the peace, and such was the view of the older authorities. In Dalton's *Justice*, c. 124, a libel is defined—a thing tending to the breach of the peace. In *Hick's Case* (Hob. 215) it is called a provocation to a breach. In *R. v Summers*, 1 Lev. 139, it was said to be cognisable by justices because it tended to a breach of the peace. In *Hawk. P. C.*, c. 73, § 3, it is called a thing directly tending to a breach of the peace. In *R. v Wilkes*, 15 *Parl. Hist.* 1362, the House of Commons resolved that privilege did not apply to publishing seditious libels; and hence that a member of the House might be imprisoned and dealt with in the same way as any member of the public. PRATT, C. J., had held the contrary, because it was no breach of the peace.—*R. v Wilkes*, 2 *Wils.* 151.

² The Peers' protest in the House of Lords, when Wilkes' case was considered, well put this point: "To say that a libel, possibly productive of a breach of the peace, is the very consequence so produced, is, in other words, to declare that the cause and the effect are the same thing. And though one were to add the inflaming epithets of treasonable, traitorous, or seditious to a particular paper, yet no words were strong enough to alter the nature of things."—15 *Parl. Hist.* 1374.

the view, which led judges previous to Fox's Act to adhere to the practice of treating the character of a writing, if libellous or not, as a question of law; and so the functions of juries in such cases were reduced to an absurdity—a result which led the legislature to interfere and put an end to it, as has already been stated.

Seizing and destroying blasphemous and seditious libels.—Courts of law disclaimed the power to order the libellous document even after verdict to be destroyed.¹ But latterly in case of a conviction for blasphemous or seditious libel, the court may now, by statute, after verdict or judgment, order all copies of the libel found in the possession of the defendant, or of other persons for the use of the defendant, to be seized and detained in safe custody, and for this order evidence on oath must be previously given.² When formal judgment is entered against the defendant, the court is then to dispose of these copies.³ It was once thought, until Lord Camden showed the illegality of the practice, that a secretary of state could issue a warrant to seize seditious libels in anybody's possession, and search anybody's house in order to find them.⁴ But the only power of dealing with libels is as above stated.

Ordering libel to be burnt.—One mode of disposing of written or printed libels has apparently been adopted by most nations with singular unanimity, and that is the burning of the obnoxious paper, which has been assumed rather hastily to be a final extinguishment of all the mischief therein contained. Constantine ordered contentious libels to be burnt. And whoever collected and read false libels and did not immediately burn them committed a capital offence.⁵ To keep books of magic also was a crime, and they too were ordered to *the same fate*.⁶

¹ *R. v Cator*, 2 East, 361 ² 60 Geo. III. & 1 Geo. IV. c. 8, § 1.

³ 1 Geo. IV. c. 8, § 2. ⁴ See 2 Pat. Com. (Pers.) 130. ⁵ Cod. Theod. b. ix. 41, 34.

⁶ Paul. Sent. The case of the Roman Senate ordering Labienus' books to be burnt as libellous, was said to have been the first instance of this mode of punishment. The laws of Valentinian and Valens decreed that if a person met with a defamatory libel either in a public or private place even by chance, and did not immediately destroy it but divulged the same, he should suffer death as if he were the author.

In our own country burning an obnoxious libel was deemed almost a matter of course. A rule was recognised that, if the libel refer to a private person, it must be burnt or delivered to the magistrate; if it referred to a public person, it was to be delivered to the magistrate.¹ In Queen Anne's reign the decree of the University of Oxford in 1683, respecting passive obedience, was ordered by the House of Commons in 1710 to be burnt by the hands of the common hangman, as contrary to the liberty of the subject and the law of the land.² In 1702, a sermon containing reflections on Charles I. was ordered by the House of Lords to the same fate, and the House of Commons did the same with Defoe's ironical satire, which recommended all dissenters to be killed like snakes and toads.³ And Sacheverell's sermon was also so treated.

In 1751 a seditious libel entitled "Constitutional Queries recommended to every true Briton," was ordered by the House of Commons to be burned by the hands of the common hangman in Palace Yard at 1 P.M., and the Sheriff of Middlesex was to attend and cause the same to be burnt accordingly.⁴ When Wilkes' libel in the *North Briton*, No. 45, was brought to the knowledge of the House of Commons in 1763, the House resolved, that it was false, scandalous, and seditious, and tending to excite to traitorous insurrections, and ordered that it should be burnt by the hands of the common hangman in Cheapside.⁵ But when the sheriff proceeded to see the order executed, the mob were violent and pelted the officials with stones and missiles, the general cry being "Wilkes and liberty;" and they burned a petticoat and jack-boots in its stead, and the blame of this led to a parliamentary inquiry of four days.⁶ Since that date neither the legislature nor the courts of law have thought fit to return to this primitive experiment. And as Parliament recently gave authority by a statute to magistrates under certain conditions to destroy obscene libels, this may be treated as an implied repeal of the doctrine of the common law as to this kind

¹ Wraynham's Case, 2 St. Tr. 1060.
Plymley.

³ 6 *Parl. Hist.* 22, 93.

² *Syd. Smith*, P.
⁴ 14 *Parl. Hist.* 869.

⁵ 15 *Parl. Hist.* 1360.

⁶ *Rae's Wilkes*, 53. ⁴ *Walp.*
Lett. 147.

of burning of other libels, seeing that at best it was but a barbarous usage.¹

No summary remedy or injunction for libel or slander.—Whatever be the nature of the libel, whether blasphemous, immoral, seditious or defamatory, no power exists in any judge or court to punish summarily that offence, except it be also a contempt of court. It is an indictable offence or it is nothing, and the usual steps must be taken either by criminal information or indictment, and in the latter case a preliminary hearing before a justice of the peace may be added. But such justice can only commit for trial before the justices of assize. It is true that unlike the other libels an immoral libel may be tried at Quarter Sessions on indictment, but this arises from the jurisdiction being expressly defined by statute for that court.² Nor will the courts issue an injunction to prevent the publication of a libel, for if this were allowed there would be constant applications of that kind. It is true that Scroggs, C. J., assumed power to suppress a periodical partly on this ground.³ But he was impeached for this as an illegal exercise of jurisdiction. And such an injunction, though sometimes asked for on the ground of property being thereby injured, has been in modern times refused on the ground that the court is not the *censor morum* to decide summarily whether a statement is libellous or not; and if it is libellous it must be punished as such by action or indictment. And yet there may be some exceptions, as where some urgent step to preserve property may be involved, and where injunction will not be refused merely because of the libellous character of the act to be restrained.⁴

Costs in criminal prosecutions for libel.—Where there has been an indictment for libel and verdict either of guilty or not guilty, no provision was made by the common law for costs, and thus any change of this state of things must be due to statutory powers. When the Attorney-General files an *ex officio* information, it is beneath the dignity of the Crown to pay or receive costs. Where the prosecution was by way of criminal information and the

¹ See Stat. 20 & 21 Vic. c. 83, *ante*, p. 70.

² See *ante*, p. 213.

³ 8 St. Tr. 198.

⁴ Prudential Ins. Co. v Knott, L. R. 10 Ch. 142.

defendant was found guilty and fined, it seems to have been long a rule of practice, that one-third of this fine might be allotted to pay the prosecutor's costs, and if insufficient to do so the Treasury was accustomed to reimburse the prosecutor for the residue.¹ But if no fine was imposed, there was no means of paying costs provided.

In 1692 the legislature saw the hardship to which defendants were often put by criminal informations being begun and not proceeded with, thereby causing grievous costs. Accordingly by a statute no prosecutor was afterwards allowed to begin that proceeding without entering into recognisance for 20*l.* to pay the defendant's costs, if the prosecution was not proceeded with. If it was not proceeded with in a year, or if judgment were given for the defendant, then the court was to give the defendant his costs; unless the judge certified, that there was no reasonable cause for the information.² It is true this enactment has been held not to apply when the trial is at bar, for no other reason but because 20*l.* was seen to be too small a sum to cover the costs of such a mode of procedure.³ And on the other hand, the defendant could never get more than 20*l.*, the amount of the recognisance, and which is usually a mere fraction of the costs he incurs.⁴ And this is still the law as to blasphemous, immoral, and seditious libels.

With regard, however, to defamatory libels the subject of costs is now regulated more justly by the Statute of 6 & 7 Victoria, cap. 96. Whether the defendant plead the truth of the libel or not in answer to an indictment or information, if he obtain the verdict, he is entitled to his costs.⁵ And if there was a criminal information the defendant is entitled also to his costs of the rule of court, which must precede the filing of such information.⁶ And conversely it was also declared, that whenever the prosecutor succeeded on a plea of justification set up by the defendant of a defamatory libel, then he was to have his costs allowed.⁷ On one occasion the proprietor of a newspaper, having been indicted and fined for a libel which was inserted without

¹ 1 Chitt. Cr. L. 871. ² 4 W. & M. c. 18, § 1. ³ *R. v Clerk*, 7 Mod. 47. ⁴ *R. v Brook*, 2 T. R. 190. ⁵ *R. v Latimer*, 15 Q. B. 1077. ⁶ *R. v Steel*, 1 Q. B. D. 482; 2 Q. B. D. 37.

⁷ 6 & 7 Vic. c. 96, § 8.

his knowledge by the editor, sued the editor to recover back the amount of fine and costs which had been so brought upon him ; but the court held that there was no ground on which such an action was sustainable, because one of two participators in an indictable offence can have no remedy against the other.¹

Remedy for slander or libel by action for damages.—

The remedy by civil action for slander or libel is founded on the same views as other actions for damages, namely, that inasmuch as character or reputation is the means of livelihood to most, and is at least a substantial means of power and happiness to all, any invasion of this right is a good cause for a jury awarding a sum of money as damages. This sum may be viewed, not merely as compensation to the plaintiff, but also as a punishment to the defendant sufficient to induce him and others to abstain from such wrongful acts in future. This last ground, indeed, is of the essence of all laws, for if laws do not supply a sufficient average motive to abstain from injuries, they are either no laws at all or altogether inadequate for their purpose. The chief characteristic of an action for damages as contradistinguished from an indictment or information is, that the plaintiff is entire master of this remedy either to enforce it or let it alone. If he commence it he can also withdraw it, with or without some small payment to the defendant, such as the court may sometimes enforce; as is usual in all civil cases, for needlessly putting such defendant to expense by beginning an action and not going on with it. But in all circumstances the plaintiff is subject to no control in enforcing this remedy. He can either sue for the injury or not, and he can withdraw his action if he pleases without any dictation or control of third parties.

The first action for slander was in 30 Edward III., and from that time to Elizabeth the actions were few, and only for weighty causes. In rude and turbulent times slanders are usually redressed by a blow, and legal remedies are not dreamt of. During the reigns of Elizabeth and James I., the actions began to increase.² And Holt, C.J., seemed to

¹ Colburn v Patmore, 1 C. M. R. 73.

² 2 Selw. N. P. 1191. Bac. Abr. Sland. D. 1. 3 Bl. Com. 124. COKE in his time said these actions were far too frequent.—Crofts v Brown, 3 Bulstr. 167. But LORD HARDWICKE said that the old

think that actions for words ought to be encouraged, for they were a great means to preserve the peace.¹

The pleadings in actions for libel.—The same leading feature distinguishes the plaintiff's statement of his claims in an action as was noticed of an indictment. The pleading must set out the defamatory words, so that the court may see, that they are capable of bearing a defamatory sense, and so that the defendant may know distinctly the charge.² If this were not a rule, words, innocent in themselves, might by the witnesses be perverted from their true meaning, or be by the jury so interpreted as to make a defendant clearly liable at law. It is not, however, necessary to set out the whole book or publication; such passages as contain the libellous matter will suffice.³ And when the libel has been destroyed and secondary evidence becomes admissible, it is still necessary to set out the words as near as possible, and prove those very words instead of merely proving their substance.⁴ Though it was usual in pleadings to call a libel a false and malicious libel, yet neither the one nor the other epithet was essential, for in civil actions both are implied, especially as the words of the libel require to be set out, and so bear on their face what the court knows at sight to be libellous. And it is enough, in modern practice,

judges used their utmost endeavours to explain away the most opprobrious words.—*Carpenter v Tarrant*, *Cas. t. Hardw.* 339. It is said that in the reports there is no action for slanderous words before Edward III. and only one such for fifty years of that reign; three such actions under Edward IV; five under Henry VIII.; in Elizabeth 17.—*March on Slander*, 4. And VAUGHAN, C. J., said that formerly no actions for words were brought unless the slander, if true, would endanger the life of the slandered person, and that the growth of these actions would spoil all communications.—*King v Lake*, 2 *Vent.* 28.

And when a solicitor of Gray's Inn, and who had the Countess of Lincoln for client, sued a man for saying "he would milk her purse and fill his own pockets," whereby he lost her as a client, Vaughan, C. J., wished to laugh the case out of court, saying the words had no more relation to the plaintiff's business than "saying of a lawyer he hath a red nose or but a little head." The three other judges, however, held the words, coupled with special damage, were actionable.—*Ibid.*

¹ *Clifton v Wells*, 12 *Mod.* 634. ² *Wright v Clements*, 3 *B. & Ald.* 509; *Gutsole v Mathers*, 1 *M. & W.* 503; *Bradlaugh v R.*, 3 *Q. B.*, *D.* 607. ³ *Rutherford v Evans*, 6 *Bing.* 458. ⁴ *Rainy v Bravo*, *L. R.* 4 *Privy C.* 287.

to allege, that the words were used in a defamatory sense, though the inuendo mistake that defamatory sense.¹ And for a like reason, if the libel was in a foreign language the original words and also a translation should be set out.² As, however, many libels do not bear on the face of them an expressly defamatory sense, it is necessary in the pleading to set forth that sense; and as few libels describe in exact terms the person meant to be libelled, it is also necessary to indicate by an inuendo, that the plaintiff was the person, of and concerning whom the words were used.³ If the words are used in reference to a trade or profession, it must be shown in what way the words were connected with such trade or profession.⁴ And the statement of claim must expressly or impliedly allege that the libel was published.⁵

If special damage is necessary to constitute a cause of action, then the statement of claim must state the nature of such special damage with some detail. Thus, some names should be given where they must necessarily be known to the plaintiff; as in case of loss of friends, who used to entertain the plaintiff with food.⁶ But where the names of individuals are not necessarily known none need be set forth; as, for example, the hearers of a preacher refusing to continue attendance;⁷ or customers at an inn or eating-house, who are not necessarily known to the keeper.⁸

The defence to action that the libel is true.—One qualification of the remedy of an action for libel is, that it is not enough to establish the tendency of the words to cause injury to character, but it is also necessary to establish the falsehood of the libellous act or conduct alleged; and yet the truth of the libel is rather a defence to be proved by the defendant than an allegation to be disproved by the plaintiff. The reason why it lies on the defendant to prove the truth rather than on the plaintiff to prove its falsehood,

¹ C. L. P. Act, 1852, § 61; *Watkin v Hall*, L. R., 3 Q. B. 402.

² *Zenobio v Axtell*, 6 T. R. 162; *R. v Goldstein*, 3 B. & B. 201.

³ LORD MANSFIELD said that an inuendo meant something explanatory of what was said before sufficiently; but it did not mean the addition of new matter.—*R. v Tooke*, 20 St. Tr. 794.

⁴ *James v Brook*, 9 Q. B. 13. ⁵ *Baldwin v Elphinston*, 2 W. Bl. 1037; *Watts v Fraser*, 7 A. & E. 233. ⁶ *Moore v Meagher*, 1 Taunt. 39. ⁷ *Hartley v Herring*, 8 T. R. 133. ⁸ *Evans v Harries*, 1 H. & N. 251.

seems to be no other than this, that it is more easy to prove the one than the other—the positive than the negative. In the time of Lord Hardwicke, 1735, it seems that it was not recognised as quite clear that the truth of a libel could be set up as a defence to an action.¹ But the judges' opinions delivered to the House of Lords in 1792 treated it as then settled. It is now enough for a defendant to say, that the libellous words or writings were true.² And he must take notice also of the inuendoes added by the plaintiff. The reason given for the truth of the libel being a good defence to an action for damages has been said to be, not that it negatives malice, but that it shows that the defendant had no character to lose, and hence that no allegation could do it injury.³ But though the truth of the libel is a defence to an action, the mere honest belief in its truth is no defence whatever, if in point of fact the libellous matter is not true; and yet this honest mistake may lead a jury to reduce the damages which they award for the wrong done.⁴ And for a like reason, if a libel impute felony, and all that can be proved in defence is, that there were circumstances leading merely to suspicion of felony, this will be no defence.⁵ It is sometimes attempted to justify a libellous statement by proving a general rumour or evil reputation existing to the same effect as the libel. At one time it was allowed for the defendant to give evidence of such reputation, without a plea of justification, as in mitigation of damages.⁶ But the inadmissibility of such evidence has been decided as already stated.⁷ And hence when there is no plea of justification, it cannot be asked of witnesses or proved, that before the cause of action the plaintiff was generally reputed to have been guilty of the conduct imputed.⁸ Where the libel imputed a criminal offence and the truth is pleaded, if the plaintiff has been tried on the charge and convicted, the defendant may give in the conviction as some evidence of the truth of the libel. But even though acquitted, the defendant may still prove

¹ *R. v Roberts*, Dig. L. Lib. 89.

² Jud. Act, Ord. xix.

³ *Macpherson v Daniels*, 10 B. & C. 272. ⁴ *Campbell v Spottiswoode*, 3 B. & S. 769.

⁵ *Mountney v Watton*, 2 B. & Ad. 673; *Chalmers v Shackell*, 6 C. & P. 475. ⁶ *Leicester v Walter*, 2 Campb. 251.

⁷ See *ante*, p. 183; *Thompson v Nye*, 16 Q. B. 175; *Bracegirdle v Bailey*, 1 F. & F. 538. ⁸ *Ibid.*

the truth of the charge, for the acquittal having been *res inter alios acta* is not *res judicata*.¹ And the trial of this plea does not materially differ from a criminal prosecution, as where the libel is an imputation of bigamy and the defence set up is its truth.² And if there was a doubt, the jury ought to be directed to give the defendant the benefit of it.³

When libel is said to be substantially true.—It often happens that a libellous statement consists of several parts, some of which are true and some of which are false. In this case, unless the truth or other justification can be proved as a defence to the whole libel, the plaintiff must obtain damages for that part which is not covered by the defence, if that is a material part of the whole.⁴ Hence much of the difficulty, on such occasions, turns on the construction of the libel compared with the nature of the defence proved. Thus, where A wrote to a master about his servant that there was “nothing too base for him to be guilty of;” and what was proved in defence was, that the servant had once signed an I O U, and afterwards denied his signature; this was held a fair justification of the general words used.⁵ As to such cases the rule is, that the substantial imputation must be looked at, and the mere turn of the expression or some vague exaggerations and abusive epithets are not to be regarded. In other words, if the sting of the charge be proved, the rest is of little consequence.⁶ Thus, the use of the words scamp and rascal is often nothing more than a rhetorical exaggeration, and does not add to the substantial imputation, if there is one sufficiently substantial in the rest of the language; as, for example, where the defendant in charging the plaintiff to be a seller of poisonous pills, called him in course of his libel “ignorant scamp,” and “rot-gut rascal.”⁷ And hence, sometimes, the difference between libel and no libel may turn on a slight mistake in describing the imputation, but a mistake not very material; as where the plaintiff had been described as having been convicted of riding in a railway carriage without a ticket and fined, with an alternative of three

¹ *England v Bourke*, 3 Esp. 80; *Cook v Field*, 3 Esp. 134.

² *Willmott v Harmer*, 8 C. & P. 697. ³ *Richards v Turner*, Car. & M. 417. ⁴ *Clarke v Taylor*, 2 Bing. N. C. 654; *Ingram v Lawson*, 5 Bing. N. C. 66. ⁵ *Tighe v Cooper*, 7 E. & B. 639.

⁶ *Morrison v Harmer*, 3 Bing. N. C. 767. ⁷ *Ibid*.

months' imprisonment, whereas the alternative had been only two weeks' imprisonment, and it was held, that the jury may treat this as an immaterial variance.¹

Interrogatories and evidence in cases of libel.—No question can be asked of the defendant either at or before the trial, nor any interrogatories allowed that tend to prove that he published the libel, for this is a criminal matter.² But particulars will be ordered from the plaintiff of the persons whose patronage was alleged to be lost by way of special damages.³ And in like manner if the plea of justification of truth is vague, the defendant will be ordered to give particulars.⁴ There is no such defence as setting off one libel against another.⁵ Nevertheless when the facts appear of mutual libels, the jury can always practically deal with the matter in the amount of damages they award. One important part in the remedy against a libeller often is to prove the malice of the libeller, or that the defendant was not in the exercise of any lawful purpose of his own, and other writings and acts of the defendant are often sought to be brought in aid and tendered as evidence of this malicious feeling. It was once doubtful whether and how far it was competent on these occasions to give in evidence of malice that the defendant had at other times made defamatory statements and published libels. At length, in 1851, it was settled that previous libels might be used as evidence to prove the malice in a particular case.⁶ There is, however, a difference in this respect between libels published after and those before the particular libel sued for; in the case of libels published after, though these are admissible evidence to prove malice, yet the judge is bound to point out to the jury that there may have been subsequent transactions to account for the later libels.⁷

Defence for libels in newspapers.—The mode of defence for libels appearing in periodical publications varies from that in other cases, and was made more suited to the

¹ *Alexander v N. E. R. Co.*, 6 B. & S. 240. ² *Atherley v Harvey*, 2 Q. B. D. 524. ³ *Wood v Jones*, 1 F. & F. 301. ⁴ *Jones v Bewicke*, L. R., 5 C. P. 32; *Gourley v Plimsoll*, L. R., 8 C. P. 369.

⁵ *Kelly v Sherlock*, L. R., 1 Q. B. 698. ⁶ *Barrett v Long*, 3 H. L. C. 395. ⁷ *Hemmings v Gasson*, E. B. & E. 346; *Goslin v Corry*, 7 M. & Gr. 343; 8 Scott, N. R. 21; *Harrison v Pearce*, 1 F. & F. 567.

circumstances by the Act of 1842. When a libel in such publication is complained of, the publisher's first duty is at the earliest opportunity to insert a full apology, or if the interval of publication exceeds a week, then to insert an apology in some other periodical to be selected by the aggrieved party. Should an action be brought thereafter the defendant may plead, that he inserted the libel without actual malice or gross negligence, and that he made this apology; and he may pay into court a sum of money by way of amends for the injury.¹ The payment of money into court is a vital part of this defence,² though it does not necessarily admit the liability.³ It is for the jury to say whether the apology was sufficient, and if not, to give damages irrespective of the sum paid into court.⁴ And a plea that mutual apologies were accepted and published will be a good defence, if the plaintiff again sue in respect of it.⁵ This plea of an apology is in strictness no defence, but the statute has allowed it as part of one in conjunction with a payment into court, when the libel has appeared in a periodical. In other cases than libels in the press, though an apology offered or made is no defence, yet it is allowed to be proved by way of mitigation of the damages, if notice to that effect is given at the time when the defendant pleads his defence.⁶ Sometimes after an action is brought the plaintiff and defendant agree, the one to accept and the other to tender an apology, and this being an accord and satisfaction may be pleaded, should the plaintiff attempt to depart from his agreement.⁷

Functions of the judge in trials of actions for libel.—The duties and position of the jury and the judge in criminal trials have been already set forth. In trials of civil actions, while a judge may give a jury his own impression as to the guilt or liability of the defendant, it is not usual to do so, for it is the peculiar province of the jury to decide that point.⁸ And the proper question to put to the jury is not whether the defendant intended to injure the plaintiff, but whether the tendency of the words

¹ 6 & 7 Vic. c. 96, § 2. ² 8 & 9 Vic. c. 75, § 2. ³ Lafone v Smith, 4 H. & N. 158. ⁴ Jones v Mackie, L. R., 3 Ex. 1.

⁵ Boosey v Wood, 3 H. & C. 484. ⁶ 6 & 7 Vic. c. 96, § 6.

⁷ Boosey v Wood, 3 H. & C. 484. ⁸ Baylis v Lawrence, 11 A. E. 920; Parmiter v Coupland, 6 M. & W. 105.

published was injurious.¹ And the judge is bound to tell the jury whether the language of the libel is capable of the libellous meaning charged; and if he thinks it is, to leave it to them to say, if they are satisfied that such was the meaning; and he may direct a nonsuit or verdict for defendant.² And it is, for example, for the jury to say if the defendant meant to impute felony, or only a suspicion of felony.³

Damages in actions for libel.—The amount of damages recoverable in actions for libel, though varying according to circumstances, is seldom founded on the mere mental suffering, the vexation, or disgrace, but usually on the pecuniary loss to business, if any, or if there is no business then to the social reputation, treated, as it always must be, as a valuable possession. In one case Lord Ellenborough held, that if a person who was libelled in a picture destroyed that picture, the owner of the picture could not recover damages beyond the value of the canvas and paint.⁴

In general the court will not disturb a verdict on the ground of damages being excessive. The courts used to say they have no means of estimating this value.⁵ And a new trial on the ground of excess will be refused. In one case a clergyman obtained £750 for a slanderous imputation of acts of immorality and misappropriation of the sacrament money.⁶ In like manner the court will be slow to grant a new trial for inadequacy of damages; and there must at least be a mistake of law by the judge or some miscalculation by the jury to justify it. When a clergyman recovered one shilling in a case where there had been cross libels, this was held to be no ground for a new trial.⁷ Yet where it was apparent the jury had made some compromise, and the inadequacy made it not a fair verdict, a new trial was allowed.⁸

Limitation of time for bringing action, and other incidents.—In the Roman law the doctrine was, that if an injured person overlooked the injury at the time, he

¹ Fisher v Clement, 10 B. & C. 472. ² Hunt v Goodlake, 43 L. J., C. P. 54. ³ Tozer v Mashford, 6 Ex. 539. ⁴ Du Bost v Beresford, 2 Camp. 511. ⁵ Townsend v Hughes, 2 Mod. 150.

⁶ Highmore v Harrington, 3 C. B., N. S. 142. ⁷ Kelly v Sherlock, L. R., 1 Q. B. 697; Forsdike v Stone, L. R., 3 C. P. 607.

⁸ Falvey v Stanford, L. R., 10 Q. B. 54.

was held to condone it, and could not afterwards sue.¹ Such doctrine is not followed in this country, for the time allowed for bringing an action of libel is six years from the date of publication, and for slander is two years.² But the publication of a libel referred to is not necessarily the date of the first publication, as every sale is a fresh publication, and a fresh cause of action. And hence where the plaintiff had been libelled seventeen years before in a newspaper, and sent and purchased a copy of it, this sale of a copy was held a fresh cause of action.³ It is, however, the doctrine of the common law, that an action for slander or libel dies with the person slandered, and no statute has yet altered that state of things.⁴

Costs in actions for libel and slander.—When the jury give a verdict for any sum, even for a farthing, then the plaintiff is entitled to his costs, unless the judge or a court disallow them.⁵ And while in a county court an action of libel cannot be brought except by consent of both parties;⁶ yet if the action be brought in the high court by a plaintiff who has no means, the action may be remitted to be tried in a county court, unless the plaintiff will give security for costs, or a judge excuse this, owing to the nature of the action.⁷

¹ Just. Inst. 4, 4, 12. ² 21 Jas. I. c. 16, § 3. * D. Brunswick v Harmer, 14 Q. B. 186. ⁴ See 1 Pat. Com. (Pers.) 248.

⁵ Garnett v Bradley, L. R., 3 App. C. 944. ⁶ 9 & 10 Vic. c. 108, § 23; 19 & 20 Vic. c. 108, § 23. ⁷ 30 & 31 Vic. c. 142, § 10.

CHAPTER XI.

COPYRIGHT.

First notions of copyright in English law.—The right now called copyright, though as familiarly known and understood as other rights, long struggled against the confusion of ideas which was apparent in all that the legislature, for two centuries after the discovery of printing, did relating to books, the chief product of that discovery. We have already seen, that it was a common notion long prevalent, that printing was a diabolic art—that types were worse than gunpowder or poison, the handling of which was thought essentially dangerous to government; and therefore that a licence from the Crown was required to enable any one to meddle with them, either as a printer or publisher. The judges at first seem to have imbibed the same notions, and when Scroggs and Jeffreys laid down the law, that no one could publish news of any kind, however innocent, without the king's licence, they were only faithfully interpreting the first loose thoughts that occurred to every one during the century preceding. It is true that it became gradually more and more apparent, that types had nothing about them essentially dangerous, and that after all printing was only an ordinary occupation, and that workmen became engaged in it from the same motives as they did in digging or ploughing, or weaving, or buying and selling cattle, and that the product of their labour differed in no respect from other products. But there was still another right involved beyond the mere printing, and that was the authorship of the thoughts, that gave value to the materials used in the whole process. This was indeed too abstract a notion at first for any legislature or any court to comprehend, and it

was practically undeveloped for nearly a century after the art of printing was practised. The legislature at length began to discover that there were such articles of commerce as books, and that ships could be laden with them, and that these books were often imported from foreign parts; but the only noticeable thing about them was, that they usually swarmed with heresies, and on that ground alone attracted what attention was given to them. It never dawned on the legislature or the courts of law, that there were such people as authors, probably because books were hastily assumed to be the direct emanations of some Satanic impulse, requiring to be watched, as portending danger to all government, to all law, and all order. If it had been more carefully examined it would have been self-evident, that the author merely created the material of a book by the use of his faculties, and by a long studied industry in nowise distinguishable from the industry applied in innumerable other forms.

Bracton had so vague a notion of copyright, that he thought that "letters, though golden, belonged to the parchments and papers, as much as things built on or inserted in the soil belonged to the soil;" whereas he admitted the rule was the reverse as to paintings.¹ He thought the nearest analogy between paper and what was written upon it was that of the soil with trees planted in it according to the maxim of the Roman law—"if a stranger plant trees in another's soil the trees become the property of the owner of the soil." The same delusive maxim was relied upon so late as a century ago by some of those who argued against copyright at common law; and even Lord Camden had not apparently outgrown its misleading influence.

None of the early statutes, though dealing, as we have seen, with printing and books, touched upon copyright. The legislature, in the time of Henry VIII., made it the duty of the Lord Chancellor and chief justices to inquire into the price of books, and to limit not only the price, but the cost of binding; and the offender against the statutory restrictions was to forfeit a sum for each book.² Coke, in noticing this statute, seemed to have no appreciation of the author's right, but dwells on the importance of this duty

¹ Bract. b. ii. c. 2. ² 25 Hen. VIII. c. 15; 2 Inst. 744. See other statutes bearing on the same subject, *ante*, pp. 44, 51.

cast on the judges of fixing the price. Yet the courts seem to have taken usually a correct view, in times a little later, of the author's right in the book which he produced, and treated it as his property. No recorded decisions of the courts, it is true, are to be found until about the end of the seventeenth century; and they all show somewhat vague ideas of the relations of the rights involved.¹ The Stationers' Company had obtained a charter from Philip and Mary in 1556, the policy of the Crown at that time being to prevent the propagation of the reformed religion. Presses, as already stated in a former chapter, required to be licensed, and the Crown, through the machinery of the Star Chamber, had enforced its powers of search, forfeiture, and imprisonment, against offenders. In 1559 the registers of the Stationers' Company contain records of fines for evading the copyright; and in 1573 there are entries of the sale of copies (*i.e.*, copyrights), with their prices.²

The first Copyright Act of Anne in 1709.—About 1709 authors and publishers began grievously to complain of piracy and the difficulty they had in tracing the wrongdoers, and recovering damages or stopping the mischief. And they petitioned Parliament for an Act to give them better remedies. And in 1709 an Act passed which recited, that "persons had of late reprinted books without the consent of the authors, to the very great detriment and too often to the ruin of them and their families." This Act caused afterwards great litigation, and, as authors discovered to their cost, caused nothing less than confiscation of their property. "This was done," as Lord Lyndhurst, L.C., remarked, "by the introduction of one or two

¹ They are reviewed in the case of *Millar v Taylor* in 1769.—4 *Burr.* 2317. And see Lilly's Entries, 67; Carter, 89; Skinner, 234; 1 *Mod.* 257.

² Chalmers' *Apol.* Shaksp. 298. When Captain Bell in 1646, "at great cost and pains discovered a manuscript of Luther's *Table Talk* marvellously preserved" and published his translation, the House of Commons magnanimously resolved, that he should have the sole disposal and benefit of printing it for fourteen years, and that none should print the same unless licensed by him.—*Journ. H. C.*, 24 Feb. 1646. This crude resolution, which presented to a man his own property for fourteen years, probably gave the cue to the unknown author of the first copyright act of Anne.

ill-considered words in a statute which was meant to be a benefit to literature, but turned out a fatal gift.”¹

This statute of Anne, though professing to be “for the encouragement of learned men to compose and write useful books,” in its main enactment said, that “the author of a book shall have the sole liberty of printing and reprinting such book for fourteen years and no longer;” but if the author was alive at the end of fourteen years, then for fourteen years more. Then penalties were imposed on those who printed and sold the book, namely, forfeiture of the books printed and one penny for every sheet found in the offender’s possession. The benefit of the Act was, however, given only to those who registered their title with the Stationers’ Company before publication, and this was made a condition precedent to any remedy whatever. Any person who thought the price of a book too high might complain to the Archbishop of Canterbury or the judges, who had power at the cost of the bookseller or printer to settle the price as seemed just. And nine copies were to be given to certain libraries named. Though the statute said nothing about the author being entitled to bring an action during the statutory term against any piratical publisher, the courts about a century later held that this was necessarily implied.² In 1801 the penalties were somewhat increased, the term of copyright was extended, and some details amended.³ In 1814 the term was made twenty-eight years in all cases, and if the author then lived it was to extend till his death.⁴ In 1842 the term was extended to forty-two years, or to the term of natural life, and seven years more, if this last term exceeded forty-two years.⁵

But the theory of all these Acts was one and the same, namely, that whereas at common law the author had the same perpetual right in his property as other proprietors

¹ H. L., 63 *Parl. Deb.* (3) 782. The real author or draughtsman of the act of Anne is unknown, and the Act excited little attention at the time, and the authors in Anne’s reign seem to have shown about as little knowledge and appreciation of the law affecting themselves as those who at that date directed the legislation. It was a peculiarity of Swift, that he never cared about any of his copyrights.

² *Beckford v Hood*, 7 T. R. 620.

³ 41 Geo. III. c. 107.

⁴ 54 Geo. III. c. 156.

⁵ 5 & 6 Vic. c. 45.

have in lands and houses and ships and horses, yet in the single case of authors their right has been confiscated without compensation, after at first fourteen and now after forty-two years.¹

Practical effect of the Copyright Acts on authors.—This last view requires to be here explained a little more fully, so that any ordinary understanding can comprehend the situation. The statute of Anne affected authors in this way. Before that act (according to the opinion of eight against three judges in 1774) the author had not only the right to maintain an action against pirates, but had that right *in perpetuum*, that is to say, until he or his executors sold it. But half of the judges in 1774 further held, that the statute, owing to its peculiar language, cut down this absolute (or, as it was sometimes called, this perpetual) right to fourteen years, and then confiscated the rest altogether without giving any compensation. In the case of all other kinds of property, whether land or houses, or cattle or ships, no instance has ever occurred in which the legislature has confiscated the right of property, after a stated term of years in the same way. It

¹ The statute of Anne, as ASTON, J., observed, was apparently introduced merely to give a speedier and better remedy for a limited time, and not to interfere with a property which existed *a priori*, and which would outlast that temporary collateral remedy.—ASTON, J., *Millar v Taylor*, 4 Burr, 2350.

It is quite possible that a legislature may blunder in the words used to express its meaning; and though courts also frequently blundered in former times, yet they might on this occasion have rightly held, that owing to the crude and unworkmanlike language used by the unknown draughtsman of this act, there was no alternative for them but to hold, that that act extinguished the common law perpetual copyright after the statutory period had elapsed. Such at least was the decision, though probably judges in modern times would have decided differently.

That the act of Anne would not have been construed in modern times so as to confiscate without compensation the author's common-law right is obvious from this, that by the 9th section of that act, it is provided that "nothing in the act contained shall extend or be construed to extend either to prejudice or confirm any right that any person or persons have or claim to have to the printing or re-printing any book or copy already printed or to be printed." How half of twelve judges could have overlooked this proviso does not anywhere appear. Their opinions are nowhere printed at length, and are not even preserved in the House of Lords' Library, so that we cannot know by what reasoning they disposed of that proviso.

has, for example, never ordered the property in a farm or a house, or a horse or a ship, or an advowson, to be confiscated after fourteen years, and the proceeds given to the poor of the parish or to any persons who choose to scramble for it. Yet this has been done in the single case of authors, and no reason has been given except that the invidious distinction is apparently due to a blunder of an Act of Parliament in 1709, which has never yet been rectified, though somewhat palliated by extending the term from fourteen to forty-two years. The act of Anne in all its sections bears the marks of crude and imperfect acquaintance with the subject. In former times, printing and types were put in the same category as gunpowder and poison, being illegal in themselves, and yet no statute has ever passed, which, after a term of fourteen or forty-two years, confiscates the property even in poison and gunpowder, or in the vested rights of their manufacturers, or which gives the accumulated value of the good-will to the poor. Authors thus stand in the invidious position of being the only skilled workmen known to mankind, who, after creating and enjoying their property for forty-two years, are obliged to surrender it for no other reason except that all the rest of their fellow-creatures are extremely anxious to have possession of all the benefits derivable from that property, without the trouble of paying for it.

Progress of early decisions as to common law copyright.—All the cases reported in the law books up to the case of *Millar v. Taylor* in 1769 were reviewed by Lord Mansfield and other judges, and these were said to be consistent with the notion, that, at common law, apart from statute, the right inherent in the author of a manuscript and book was an exclusive right to turn that manuscript to advantage in the only way in which it could be so dealt with, namely, by printing and selling copies as articles of commerce. At all events, even if those authorities were somewhat vague and confused, this has often before happened with novel rights emerging in the law. As to their precise measure and status, courts usually at first vacillate till a firm view is obtained and adhered to. And, at all events, those authorities do not contradict the doctrine, that there was and is such a common-law right

as has been asserted by Lord Mansfield and other judges. Those early decisions perhaps show a vague leaning of the courts in favour of the doctrine, that whenever a matter is doubtful it is always safe to assume that the right came first from the Crown. And hence they had easily held, that the copyright in an almanac "which, as they said, has no particular author," was in the king.¹ But a hundred years later, the court found, that this doctrine was quite untenable, and that a Crown patent for the exclusive printing of almanacs was worthless.² The Court of Chancery protected the common-law copyright, which was held to survive after the statutory period had expired, and it was not till 1760 that the point was first started, in reference to a piracy of the *Spectator*, that the statutory short period superseded and extinguished the perpetual common-law right—that such statutory right was the only right, and when it ceased, there was no copyright beyond it.³ All the reported cases, therefore, up to 1769, it may be assumed, were vague, and proved little. At length, in 1769, the Court of Queen's Bench, by a majority of three to one, distinctly decided, that at common law the author or assignee of a copyright could recover damages for the publication of copies without the author's consent, irrespective of the statute of Anne, and that that statute merely gave a collateral remedy for a limited time.⁴ In another case, however, in 1774, the House of Lords, after taking the opinion of eleven common-law judges, held that though at common law the author and his assigns may have had the sole right of printing and reprinting the book in perpetuity, yet that the statute took wholly away that right and substituted for it a shorter right for the term of years mentioned, namely, fourteen years; and that the author had thereafter no other right of any kind beyond such as the statute so substituted.⁵ The later authorities accordingly have now assumed as settled law, that the copyright of published writings is regulated exclusively by statute, whether formerly existing at common law or not, that is to say, though a right of action lay at common

¹ Stationers' Co. v Seymour, 1 Mod. 256. ² A.D. 1775, Stationers' Co. v Carnan, 2 W. Bl. 1004. ³ Tonson v Collins, 1 W. Bl. 301, 321. ⁴ Millar v Taylor, 4 Burr. 2303. ⁵ Donaldson v Beckett, 4 Burr. 2408.

law for invasion of copyright, yet after the statute of Anne the common-law right of action was superseded by the action given by that statute, and hence that an action for piracy could only be brought during fourteen (now forty-two) years after publication.¹

Reasons why copyright does not differ from other rights.—That the author of ideas which he has put in writing for any legitimate purpose either of profit, amusement, or gratification, should have the sole and exclusive right of multiplying copies for the furtherance of his views, and should at common law be entitled to the same protection against the violation or obstruction of that right as in other cases, while he pursues the business of life and seeks to advance his objects, might seem a truism. Thinking and putting thoughts into words in such a form as to be intelligible, is only one mode of working and of exercising the human faculties. The object of all laws is nothing else than to protect each man in pursuing his own ends, in the fullest manner consistently with all other persons equally pursuing theirs, and subject only to such reasonable restrictions as this latter consideration requires. To think, and to speak, and to write, are as natural instincts of mankind as to eat, to drink or to work, to grow corn, or to sell cattle. To write or communicate one's ideas to the public is as natural and obvious a development of his working powers, as it is to speak or to write to one individual only. To print copies of the same writing is nothing else than to save the labour and expense of innumerable hands by a mechanical process. But whether an author choose to employ an army of clerks to copy his writings or a few hands to print them can make no real difference as to what must be the view of the law regarding the nature and effect of the thing he is doing. The author of a writing creates a specific property, for if he finds, that the diffusion of many copies ministers to the objects of life and procures him profit, or what is sometimes a higher equivalent, viz., a fund of power and reputation amongst his fellow men, then this power of multiplying copies is substantially a property in itself, and if it is property, then it must exist so long as it can be identified and its continuity be traced. "Once

¹ *Jeffreys v Boosey*, 4 H. L. C. 815; *Beckford v Hood*, 7 T. R. 620; *Reade v Conquest*, 9 C. B., N. S. 755.

property always property," is a maxim which means, that when once a specific thing has been created and has the qualities of property, it must exist for an indefinite time, into whosoever hands it passes, until the power is exhausted or the property comes to an end. If it exists in a specific form and is capable of being identified, it must be property, or what is the same thing, the proximate cause of property. The power to issue and multiply copies is in substance the property itself; whether that power is exercised in the mode of issuing one edition or set of copies or making copies from time to time until the end of time, is immaterial. Why the mere accident of making a thousand copies by one short process of printing should operate to extinguish the original power, and prevent future thousands of copies being issued thereafter from time to time, it is difficult to conceive, and no sensible mind has rendered a reason for it.¹

Reasons alleged for confiscating authors' copyright.—

Though it has been seen, that the nature of an author's work differs in no way from other kinds of work, nor his property from other kinds of property, yet it was once urged, "that copyright is the creature of statute," as if this

¹ "It did not occur to our ancestors, that the right of deriving solid benefits from that which springs solely from within us—the right of property in that which the mind itself creates, and which, so far from exhausting the materials common to all men, or limiting their resources, enriches and expands them—a right of property which, by the happy peculiarity of its nature, can only be enjoyed by the proprietor in proportion as it blesses mankind—should be exempted from the protection which is extended to the ancient appropriation of the soil and the rewards of commercial enterprise."—*Talfourd, H. C., 38 Parl. Deb. (3) 867.*

"No property is so entirely, purely, and religiously his own as what comes to him immediately from God without intervention or participation. It is the eternal gift of an Eternal Being. No legislature has a right to confine its advantages, or to give them away to any person whatsoever to the detriment of an author's heirs."—*W. S. Landor, 2 Forster's Landor, 422.*

"The tenure by which the property in books is held is superior to that of all other property, for it is original. It is tenure which does not exist in a doubtful title, which does not spring from any adventitious circumstances. It is not found; it is not purchased; it is not prescriptive; it is original. So it is the most natural of all titles, because it is the most simple and least artificial. It is paramount and sovereign, because it is a tenure by creation."—*B. Disraeli, 43 Parl. Deb. (3) 575.*

threw great light on the subject—as if it was a perfect solution and satisfied all parties. Copyright, however, is no more the creature of statute than any other right is so. The statute does not create one's hands, or legs, or brain, or appetites, or desires, or affections; it neither gives one ideas, nor teaches one what to do with them. Burke said—"Property is not the alms of government, as life itself is not their favour and indulgence." If there were no statutes and no laws, the right of an author would be the same as it is under their protection. The only difference would be, that he would have to defend his right with his hands, and all other proprietors would do exactly the same. The law is merely a collection of remedies fitted to dispense with this single-handed combat against all comers, which the possessor of any kind of property would eternally wage in its defence. Such a right exists anterior to and is above and beyond all statutes and all laws.

Again, it was once urged, that the legislature can confiscate any man's property if it pleases, with or without terms, and with or without compensation. And this is true. It may to-morrow single out any man from the crowd; it may sell his goods and chattels, and give the proceeds to the poor; it may rase the foundations of his house to the ground and sow the site of it with salt. This may happen to any one, and there is no remedy whatever provided by the constitution. But still there will be found some people to ask, why the legislature, since it exists only for the impartial and equal protection of all, should single out one man rather than a thousand or than tens of thousands. It may be always pleasant to give away other people's property; but much of the time of courts is occupied in greatly reducing that pleasure, and confining it within as narrow a circle as possible.

Again, it was once said, that copyright is so troublesome to protect, that the best course was to confiscate it after a short period. But even if it were troublesome, the object of law is nothing else than to find appropriate remedies for each special kind of property. For example, it is troublesome to protect the game and fish on one's estate, and accordingly the statutes provide Game laws and Fishery laws to assist the owners in protecting them better by giving more prompt and effective remedies. It does this

by way of an additional and concurrent remedy, but it never extinguishes the common-law right underlying all statutory remedies. So it deals with owners of fruit, and forests, and mines. If one's body is assaulted, a statutory remedy, if pursued within six months, may be resorted to; but if it is not resorted to, the legislature has not declared, that ever afterwards the body may be beaten with impunity and all remedy be denied.

Again, it has been said, by way of *reductio ad absurdum*, that an author cannot at common law be deemed to have this perpetual copyright in the product of his thoughts, unless he can claim also the same exclusive right in every other thought of his brain, and in all his jests, fine sayings, and daily conversation. But it might as well be said, that a man cannot be paid his daily wages for digging a drain, unless he can also claim to be paid for walking to and from his work, for exchanging sentiments on the weather with all passers-by, or even for consuming his food, seeing that all these involve some kind of bodily labour, and one cannot be had without the others. The law disposes of most of these trifles by a convenient maxim—*de minimis non curat lex*. Every man arrived at years of understanding, and all courts also, instinctively recognise the broad distinction between matters of business and the small change that constantly passes between man and man in every state of society, and which does not enter in any shape or form into any contract, express or implied. Every man must converse, with or without saying things worthy to be remembered, and such things are given and taken without hope of reward; but it does not follow, because he does not reserve the ornaments of conversation for separate sale, that he cannot collect his matured thoughts and give to them the form of a book, and make them a saleable commodity, if he cares to take the trouble and write them out methodically. On what principle is he to forfeit all claim to this serious labour, because he has also thrown away many "ornaments of debate" among the crowd, for them to keep to their own use, or pass on to others gratuitously or otherwise?

What is meant by a perpetual copyright at common law.—Again, it was once said, that a perpetual copyright would lead to absurd results and could not be given effect

to by the law. But the expression "perpetual copyright" is different in no respect from any other perpetual right. All rights of property are perpetual, and cannot be otherwise. There is perpetual right in land, in a house, in a horse, in a ship. All that this means is, that the proprietor is entitled to sell or bequeath it; and the same can be done as to all personal property. Any inconvenience caused by the probable multiplication of owners is no greater in respect of books, than in respect of horses or ships. The nearest analogy being that of a ship, it never entered into the mind of any legislature, that in order to prevent multiplicity of owners in a ship the proper thing to do was to confiscate the ship after fourteen years, and give the proceeds to the poor. On the contrary, the law bends to the peculiarity of each kind of property, and has carefully protected the property in ships, and provided for all the contingencies and difficulties caused by such multiplication, and by the occasional disagreement of many joint owners. If any difficulty therefore be apprehended from copyright being vested in course of time in many hands, it is as easy to correct and provide for that, as it is in the case of ships. But no analogy in any case justifies the application to literary property of an anomalous treatment, which makes it liable to be confiscated and unfit to be enjoyed, merely because the law has not taken the trouble to provide adequate safeguards as in all other cases.

The end therefore as well as the beginning of the legislation as to copyright, is, that though confiscation has been resorted to, no reason ever has been rendered for such an anomaly; and though the legislature no doubt pleased a vast majority of its subjects by giving them the property of a very few of their number to be scrambled for, it forgot that precisely the same treatment of every other kind of property would give still greater pleasure to vast multitudes of mankind, ever anxious to possess without the trouble of working for the thing that is coveted.¹

Copyright as easily identified as other property.—One of the reasons urged against the existence of a perpetual copyright was, that copyright could not be identified, for it was only a right in ideas or fictions of the brain, that

¹ The ancient philosopher well observed, "How can I argue against the master of thirty legions?"—*Bac. Apoph.* § 160.

could not be weighed or handled or measured or eaten. But this is to separate the abstract creative power from the concrete form it assumed. If the author invents a certain order of words which no second author except by a miracle could invent, and if those words can be put in a tangible visible form, and thereby assume as durable an existence as the solid mountains, and be as easily ear-marked during all time, this objection vanishes. No two authors ever existed, who could invent or compose their thoughts in identically the same order of words for a few sentences running; and if so, then the product of the one author stands out separate and can at all times be as easily distinguished from the product of another author as the cattle or lands or ships or jewels of one proprietor from those of his neighbour. If so, then the property of the one can be as easily protected against invasion, or at all events remedies for the one can be made as appropriate as for the other. This is clear from what actually occurred in 1709.¹ The assumption, that copyright did not exist before the statute of Anne because it could not be identified and could not be exclusively possessed, was a favourite *reductio*

¹ The claim to copyright at common law is not, as was formerly said, "to ideas, but to the order of words, and this order has a marked identity and a permanent endurance. Not only are the words chosen by a superior mind peculiar to itself, but in ordinary life no two descriptions of the same fact will be in the same words. The order of each man's words is as singular as his countenance. It is true that the property in the order of words is a mental abstraction, but so are also many other kinds of property, as, for instance, the property in a stream of water, which is not in any of the atoms of water, but only in the flow of the stream. In other matters the law has been adapted to the progress of society according to justice and convenience, and by analogy it should be the same for literary works, and they would become property, with all its incidents, on the most elementary principles of securing to industry its fruits, and to capital its profits."—*Erle, J.*, *Jeffreys v Boosey*, 4 *H. L. C.* 870. "The subject of property is the order of words in the author's composition, not the words themselves, they being analogous to the elements of matter which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation."—*Erle, J.*; *Ibid.* No second author could express himself in the same order of words on any subject, however shortly treated, as another author, though they may deal with the same fundamental ideas. This order of words is therefore necessarily individualised and ear-marked, and incapable of being mistaken for any other man's product.

ad absurdum used by counsel, who argued against the common-law right a hundred years ago. The statute, according to their theory however, did nothing more than say—"Let there be an action in future;" and then there was no difficulty in identifying and protecting the exclusive copyright. If the courts had said the same thing of their own authority, as they ought to have done, and as Lord Mansfield and others said was the right thing to say, the result would have been precisely the same. It was not the statute which made copyright more easily identified or more easily enjoyed exclusively than before. All it did was simply to say—"Let there be an action." And there was an action, and all then became clear. From that moment authors had a property tangible, visible, and ponderable, with which they could freight ships; and that property could be protected by an action of damages, and by penalties against all who invaded and depreciated it; and it could be sold and bequeathed like other property for fourteen years. The law cares nothing for the fabric or texture, the quantity or quality, the length or breadth or weight, the colour or sound or durability, of any vendible commodity. It is enough that it has a lawful creator, or a first finder, or an honest possessor,—that it is capable of identification and that it is saleable. If it has these characteristics it is property, though it cannot be weighed or eaten. And if it is property—if it has all the qualities that property has—then it is the business of the law to protect the lawful owner or possessor against all comers.

Chief cause of the differences between early judges as to copyright.—The doctrine of common law as to copyright was not, as already stated, thoroughly investigated or considered till about 1769, that is to say, about sixty years after the statute of Anne in 1709 had been already passed. At last it became necessary to reconsider the matter, (1) as if no statute had passed, and (2) after the statute had passed, and as to what change that statute effected. And before stating the origin of the litigation that brought on this minute investigation, it is important to bear in mind, that the chief element of confusion was how to treat the fact of publication of a book. Nearly all the judges were agreed, that before publication the author of a manuscript book had entire control over it,

and had the same rights as he had over his other chattels. But the moment he published this manuscript, the judges were divided in their views as to the effect of the step, some treating publication as a mere mechanical multiplication of duplicates for convenience of sale, the radical right of property remaining wholly unaffected; while the other judges treated publication as a kind of solemn abjuration, and dedication of all the owner's previous rights and interests to the universe, whereby he cast off and deliberately surrendered all future control over the work, and over all duplicates that might be made of it. And yet human nature a century ago did not materially differ from what it is now. Lord Mansfield, C. J., was the chief champion of the former doctrine; while Lord Camden, ex-Lord Chancellor, was the chief champion of the latter doctrine.

False analogies in early treatment of copyright.—The two leading cases in which the common-law doctrine of copyright as affected by the statute of Anne was reviewed and minutely discussed, occurred in 1769 and 1774. The two main questions were, (1) whether there was at common law a perpetual copyright in the author after publication as well as before; (2) if so, whether the statute of Anne extinguished this perpetual copyright, and substituted a limited and temporary copyright of fourteen years after publication and no more.

Those judges in favour of perpetual copyright reasoned thus:—"That everything was property, that was capable of being known or defined, and capable of a separate enjoyment. That no man should be allowed to grind any corn but his own, or to build a house with another man's wood. That literary copyright was capable of perpetuity; even land, the most tangible species of property, might be washed away by the sea. Each owner was entitled to as full enjoyment of each kind of property as the nature of the case admitted. Publication was neither a sale, nor a gift, nor a forfeiture, nor an abandonment, and these were the only ways in which a person could part with his property. When an owner gave away land for a highway, he did not give to the public the trees or the mines upon or under the surface. So with the copyright, when he printed an edition, the radical right of printing more still remained

in him unaffected. Even if an incorporeal idea had the merit of promising future profit to the inventor of it, it was the same as property, and the fruits should be his. It would be singular if publication should be a forfeiture, and if the first moment the thinker endeavoured to raise a profit from his thought, he lost it.”¹

On the other hand, those judges who opposed the notion of perpetual copyright after publication reasoned thus:—“There can be no property in incorporeal ideas. If one opens the door of a basket of pigeons, they fly away, and are irretrievably lost. If I take water from the ocean, it is mine; but if I pour it back, it is mine no longer. An ogle is a lady’s own whilst in private, but if she ogles publicly, they are every one’s property.”² The thinking faculty was a gift with which all men were endowed, and ideas produced by it should likewise be held common, and not deemed subject to exclusive appropriation.³ Ideas were so ethereal as to elude definition; and no characteristic marks remained whereby to ascertain them. Exclusive appropriation of literary works was a monopoly.⁴ All that could be urged for copyright was moral fitness, but this amiable principle would only make laws vain and judges arbitrary. In all other cases of purchase payment transfers the whole and absolute property to the buyer; why not when a copy of a book is purchased?”

¹ 17 *Parl. Hist.* 467. “All the knowledge that can be acquired from the contents of a book is free for every man to use. If it teaches mathematics, physic, husbandry, if it teaches to write in verse or prose; if by reading an epic poem a man learns to make an epic poem of his own, he is at liberty. . . The book conveys knowledge, instruction, or entertainment; but multiplying copies in print is a quite distinct thing from all the book communicates. . . And there is no incongruity to reserve that right and yet convey the free use of all the book teaches.”—*Willes, J., Millar v Taylor*, 4 *Burr.* 2331.

The relation which the purchaser of a book holds to the author and publisher, resembles that of the purchaser of a ticket to a proprietor of a theatre. He is entitled to derive all the entertainment, instruction, and information he can during the performance. He may afterwards think of it, speak of it, describe it, but to print tickets and sell them to all the public, so that they also might enjoy the same pleasure and he may derive all the profit, is quite another thing.—*Drone on Copyright*, 12.

² 17 *Parl. Hist.* 962.

³ *Ibid.* 972.

⁴ “Copyright is no more a monopoly than property is.”—*L.*

The result was, that though eight to three of the judges held, that the author's perpetual copyright at common law was not lost or surrendered by publication, and though six to six were of opinion, that the statute of Anne did not abolish or confiscate the author's perpetual right, and substitute for it a fourteen years' right only, yet the Peers, led away by Lord Camden's tropes and figures, and his animated declamation,¹ reversed the opinion of the judges, and held, that confiscation of the author's rights had been fully accomplished by the statute. And so the law, though changed in trifling details, has ever since been left unaltered in these two vital points.²

Lyndhurst, L. C., 63 *Parl. Deb.* (3) 782. See also *L. Hardwicke, L. C.*, *Gyles v Wilcox*, 2 *Atk.* 141.

¹ The following were the chief arguments put forward by LORD CAMDEN: "While a man's thoughts are in his brain, no one indeed can purloin them; but what, if he speaks and lets them fly out in private or public discourse? Will he claim the breath, the air, the words, in which his thoughts are clothed? Where does this fanciful property begin, or end, or continue? An action I allow will lie for ink and paper, but what says the common law about the incorporeal ideas, and where does it prescribe a remedy for the recovery of them, independent of the materials to which they are affixed? I see nothing about the matter in all my books."—17 *Parl. Hist.* 997. "Is this property descendable, transferable, or assignable? Can the author let it out for hire as the circulating libraries do? If there be anything in the world common to all mankind, science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water. Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow creatures that instruction which Heaven meant for universal benefit; they must not be niggards to the world or hoard up for themselves the common stock. Glory is the reward of science, and those who deserve it scorn all meaner views. I speak not of the scribblers for bread, who tease the press with their wretched productions; fourteen years is too long a privilege for their perishable trash. It was not for gain that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much as a sheet of a letter-press. All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chooses to demand, till the public become as much their slaves as their own hackneyed compilers are."—17 *Parl. Hist.* 999. Judgment was reversed by twenty-two to eleven of the peers, one only of those who voted being a lawyer, namely, Lord Camden.

² In Scotland the question was raised about the same time as in England, as to whether copyright after publication existed at

Nature of copyright in MS. works.—The nature of the right, which an author has in the ideas which he reduces to language is properly distinguished into two stages; one is the stage during which they have not been published, the other is the stage after publication. Before an author has published his ideas in language, oral or written, these cannot in any sense come within the cognisance of the law, and therefore are treated as exclusively under the author's dominion. Yet the manuscript has an individual existence in the eye of the law, though the original has been destroyed, as was shown in the case of Lord Clarendon's *History*, which had been copied in manuscript and the original lost by fire, and after the lapse of 100 years his executors were held entitled to restrain a piratical publisher from publishing it.¹ And even when a work is once published, the public may make a certain limited use of it without violating any right remaining in the author. For example, they may criticise it, talk about it, think about it, analyse it, use extracts from it, add continuations, as will hereafter appear.² So long as an author has committed his ideas to writing, and they exist in the stage of an unpublished manuscript, he is in the eye of the law as much the absolute owner, not merely of the paper, but of the order of words, as the owner of any chattel can be. The same law which gives the one right gives the other; and though chattels pass from hand to hand and are seldom retained in the possession of the first maker or first possessor, yet if the whole right of property has once come to reside with the possessor, then the right to a chattel is precisely the same as the right to the unpublished MS. It is one entire right, and it is chiefly in the contingency of lending and losing possession that some differences come to be apparent.

Lending copies of MS. to friends.—The entirety of

common law. The majority of the Scotch judges came to the conclusion, that there was no such copyright left outstanding; but LORD MONBODDO, being the minority of one, in an admirable and masterly opinion outreasoned all his contemporaries, and showed unanswerable grounds for the contrary conclusion.—See *Cadell v Robertson*, 5 Paton's App. 518.

¹ *Per L. Mansfield*, *Millar v Taylor*, 4 Burr. 2396, 2397; *D. Queensberry v Shebbeare*, 2 Eden, 329. ² *P. Albert v Strange*, 2 De G. & S. 693; 1 Mac. & G. 25.

this right to an unpublished MS. is not affected by the kind of paper on which it is written, or by the fact that several copies of the same exist in the form of lithograph copies or otherwise. It is, however, in the case of copies being given away to private friends, that the difficulty sometimes arises of protecting the exclusive right. When resolved into simple elements the right of property in an unpublished MS. involves these distinct parts:—(1) It includes an absolute right to keep for his own exclusive enjoyment whatever advantage is derivable from possessing in a written form the order of words. (2) It includes the sole and exclusive right to publish, if he thinks proper at any time, and to make profit or pleasure out of the circulation of such order of words. (3) As another phase of the same rights he has the right of action against any one who takes out of his possession the paper or the order of words written on it, and he has the right of injunction, that is, the right by process of law to prevent a stranger or trespasser publishing the MS. against his will, or any copy, abridgment, or even a description of it. In the case of Prince Albert, who had a number of etchings, and during the process of lithographing these a workman made surreptitious copies and afterwards published a description of them, the court not only ordered the surreptitious copies to be delivered up, but restrained the publication of the illustrative catalogue, which was an auxiliary right included in the larger right of entire dominion or ownership.¹ No power or court can compel the owner to publish his manuscript.

But publication is clearly to be distinguished from lending the MS. to another to read, or making lithograph or printed copies for circulating or even presenting to friends. Publication implies an offering to all comers, either gratuitously or for a price, and an inviting of purchasers; and a mere lending or giving the use of a reading implies nothing more than this, that the reader or donee of a private copy may exercise his own thoughts upon the contents but has no assignment of the valuable right to publish and multiply copies, which the author alone necessarily enjoys.² And it has been also held, that the author

¹ Prince Albert *v* Strange, 2 De G. & S. 696; 1 Mac. & G. 43.

² Prince Albert *v* Strange, 2 De G. & S. 695; 1 Mac. & G. 25.

or owner of an unpublished MS. is entitled, if he pleases, to lithograph and circulate for sale or otherwise any number of copies, and yet this will not be deemed any publication, and in no wise interferes with his copyright.¹

Copyright in MS. assignable.—Copyright before publication, like other personal property, is assignable, and passes, on the death of the author or assignee, to the legal personal representative.² And where such copyright has passed to the executors, who publish it, the property remains in them. Where the author of a MS. sells or assigns it to another with a view that the latter may publish it as his own composition, the latter has necessarily an implied right of altering it.³ When the owner of an unpublished MS. gives a copy to a third person, this *prima facie* includes no further use of it than such as that third person or his friends may derive from the perusal and from the knowledge and mental gratification such perusal confers; but it in nowise implies that the donee, or even a purchaser acquires the valuable right of publication for profit or pleasure of such copy, unless this latter right is added, and the burden of showing this must be on the donee. Yet much difficulty has been caused by the publication of a MS. in which the publisher admitted he had no copyright, but yet which it was said he had an implied license nevertheless to publish for special or general purposes. The copyright or full right of dealing with a manuscript containing the ideas of the author includes many subordinate uses. The rule is, that where a transfer of the entire right is claimed it must be strictly proved; and a subordinate and limited user only will be implied in the absence of circumstances from which the larger intention may be inferred. Such was shown to be the case when the author had only lent a MS. to take a copy, which was held to imply no right to publish it;⁴ where he said to a friend, "you may keep the letters," this was no assignment of copyright.⁵ And so lithographing a few copies to give to friends was held no abandonment of property in the MS.⁶ And merely leaving the MS.

¹ *White v Geroch*, 2 B. & Ald. 298. ² *Turner v Robinson*, 10 Ir. Ch. R. 121, 521. ³ *Cox v Cox*, 11 Hare, 118. ⁴ *D. Queensberry v Shebbeare*, 2 Eden, 329. ⁵ *Thompson v Stanhope*, Amb. 737. ⁶ *Prince Albert v. Strange*, 2 De G. & Sm. 652; 4 Mac. & G. 25.

twenty-three years in a bookseller's hands was no evidence of an assignment.¹

If there can be dedication of MS. to public.—Whether an author or proprietor of an unpublished MS. can so divest himself of the ownership as to dedicate it to the public at large without giving it to another individual has been sometimes questioned. It cannot be doubted, that any owner might so abandon the right of property as to leave it open to all or any member of the public to publish or make any other use of the document each thinks fit. This question will be found always to resolve itself into another, namely, whether in the circumstances the owner has given to some individual the entire property, or has given only a limited use of it for a particular purpose, or has simply declined to protect his right and allowed others to scramble for it. If he has given it absolutely, then the donee is the owner, and stands in the same position as the donor. If he has given only a limited use of the document, then the radical right, subject to this limited user, still remains undivested, and he can deal with it in all other respects as the absolute owner. If, however, he merely allows any third party to reprint a book without either consenting or dissenting, the right is not divested from him and vested in another. There can be no such thing as an abandonment of the right of property to the public in this sense; the right must exist in some individual or number of individuals, and it cannot leave one individual without passing instantly into another individual.

At the same time the owner may have so conducted himself with reference to this property, and with reference to a third party's dealing with it, as to deprive himself of at least one of the usual remedies against such party. And when an author, by his conduct, seems to let anybody reprint his book, though this does not give any copyright to such printer or publisher, nor amount to a license to all others to do the same; yet after allowing nine persons to do it the court will not grant an injunction against the tenth, nor assist the owner in that way. He may still resume possession, but he cannot do so without allowing those publishers, who have already helped themselves, being

¹. *Southey v Sherwood*, 2 Meriv. 435.

entitled to sell off the copies they have printed with his acquiescence. And at most he can only sue future pirates for damages, and these are not likely to be great. This is the utmost extent to which it can be said, that an author can dedicate his manuscript or book to the public. The meaning of "acquiescence" is this—where a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. Yet mere knowledge on the part of the author, that a publisher who had printed his work was about to issue a new edition, does not amount to such acquiescence as to estop the author from asking an injunction.¹ And such is the position in which a political orator stands in reference to his published speeches. If he has never himself committed those speeches to writing and encourages newspaper proprietors to publish them at their own expense, this is deemed a license to each and all who choose to incur such expense to make what profit they choose of their respective publications. And he cannot withdraw such license nor interfere until they have sold the product. Nevertheless he does not lose the radical right of republishing his own speeches in a new and separate form, if by any means he can satisfy himself that he has recovered a copy; and by the same rule they are prevented republishing the speeches separately, because the original license did not extend to republication in a separate form. And yet orators are usually so pleased to notice the circulation of their thoughts, that they seldom or ever trouble themselves about their strict rights.

Publishing MS. against owner's will.—When the owner of an unpublished MS. finds, that it is published without his consent, he may either apply to the Chancery Division for an injunction to restrain its further publication, or he may bring an action to recover damages, coupled with a claim for an injunction. The ground on which the courts interfere is, not that the owner has thereby been deprived of the profit which the publication might have brought, for the publication might be a loss instead of a gain, but because he has been interfered with in his exclusive right of deciding and dealing further with the

¹ *Hogg v Scott*, L. R., 18 Eq. 456.

matter according to his own discretion.¹ And yet if profit would have resulted, or loss of reputation, these may well be viewed as enhancing the injury. And where a book was published under fraudulent representations as to its authorship, the court declined to treat the book as the subject of copyright or of property.² The court has thus restrained the publication of manuscripts obtained without the consent of the author in a variety of circumstances: as where a conveyancer's clerk published his master's precedents of conveyancing;³ or where a clerk published a barrister's notes of cases;⁴ where one published a MS. play taken down in shorthand while being acted;⁵ and where there was a publication of MS. etchings by a printer employed to lithograph some copies for the owner.⁶ And on the same principle the court granted an injunction against one sketching from recollection a picture exhibited on view so as to obtain subscribers to an engraving, and then photographing the sketch and publishing such photograph;⁷ also against selling photograph copies obtained from negatives lent to a person;⁸ and against publication of documents bequeathed for the use of certain persons only, other than the printer.⁹ And the right of property in an unpublished MS. is not confined to works of any particular degree of merit, for the court has no means of deciding such a matter. There may be the usual line drawn in this as in all other cases—*de minimis non curat lex*—but unless the worthlessness is conspicuous and self-evident, all other degrees of excellence are on the same level, and it would be beyond the province of the law to set up distinctions. Where blasphemy, obscenity, sedition, or libel taint the MS., then the law may not lend its aid in any way; for though these are not illegal, *per se*, till they are published, still all courts must be credited with the power of intuitively discerning whether the object is fairly lawful or borders on the confines of crime before the court will help any proprietor.

Bankruptcy of owner of MS.—Where the author of

¹ Prince Albert *v* Strange, 2 De G. & Sm. 633; 1 Mac. & G. 25; 1 D. Queensberry *v* Shebbeare, 2 Eden. 329. ² Wright *v* Tallis, 1 C. B. 893. ³ 4 Burr. 2330. ⁴ Ibid. ⁵ Macklin *v* Richardson, Amb. C. 694. ⁶ Prince Albert *v* Strange, 2 De G. & Sm. 652; 1 Mac. & G. 25. ⁷ Turner *v* Robinson, 10 Ir. Ch. 510. ⁸ Mayall *v* Higby, 1 H. & C. 148. ⁹ Paley's Case, 2 Swanst. 419.

an unpublished MS. becomes bankrupt the question may arise, whether the right to publish it passes to his creditors absolutely, or whether it partakes so much of a personal right as to be inseparable from his person, still subject to his controul, and so reserved from that compulsory alienation which bankruptcy usually involves as to incorporeal as well as corporeal property. It is urged, on the one side, that inasmuch as the MS. may be of value if published, the power of so turning it into money ought to belong to the creditors; and if any loss of reputation or character should result to the author, this must be treated as merely an unavoidable incident of his insolvency, which the law cannot and ought not to regard as any further injury to him.¹ On the other hand it may be urged, that if the mere capacity of turning into money whatever may be found in the possession of the bankrupt is the sole criterion, the doctrine must be pushed to the extravagant length of publishing all his private letters, or even of making use of the bankrupt's person in every way which would turn out to be profitable, however repulsive to his feelings and honour; and this would be a tyranny nearly as disgraceful and barbarous as the law of the Twelve Tables, which allowed the creditors to divide the body of their bankrupt amongst them. Moreover if the composition of a MS. be looked at in its real character of being something existing only in an incipient state and depending on the personal judgment and will of the author whether it should be ultimately matured into property by the act of publication, it will be found to be too much mixed up with the thoughts and interior workings of a man's mind to be capable of being viewed as property or separated from his person. No court could compel an author to finish an imperfect MS., or to make up his mind to give it a final revision, or to turn all the latent capacities of his mind into some channel which would yield money to his creditors; and therefore the MS. must be treated as inseparable from the person of the bankrupt, and not a chattel saleable by creditors.²

¹ *Mawman v Tegg*, 2 Russ. 392; *Re Curry*, 12 Ir. Eq. 384; *Stevens v Benning*, 6 De G., M. & G. 228.

² The point was once raised and argued, whether a MS. found in

Copyright in lectures and addresses.—In those cases where the author has reduced his thoughts to words, and spoken them in the form of a lecture to students or auditors, one of whom has printed and published them, it was at first considered, that this could be punished and restrained by a court of equity as a breach of contract, inasmuch as there was an implied contract between the lecturer and his audience, that they might use the lecture only for their instruction, but not so as to make further use of it by publication to the world, either through the medium of shorthand-writer's notes, or the over-tenacious memory of an auditor.¹ But the correct ground on which the author of spoken lectures can restrain publication by any of the audience need not be treated as the breach of any implied contract, but rather this, that in lecturing he uses his ideas or spoken words for the limited purpose of instructing third parties, but necessarily reserves all other larger rights, and amongst these the right of afterwards publishing the lectures for his own advantage as a means of profit or happiness, either of which is a legitimate purpose, and the invasion of which is punished by the law like an attack on one's reputation or character, or the preventing of a person carrying on his lawful business. The doctrine of implied contract, whether on the part of the lecturer or the hearer, is only another form of saying, that the common sense of the relationship between lecturer and audience is best explained legally in that way. When a lecturer delivers a lecture, he must contemplate, that the mind of the hearer will be exercised in some way on the matter delivered to him, and that nothing the lecturer can do will prevent the hearer thinking and speaking about what he hears. But all this is quite consistent with the radical right remaining untouched in the lecturer, namely, the valuable right of preserving his words in writing, and of reaping the fruits of circulating that writing in the form of a book, and treating it as his own exclusive property. All other uses of the words spoken and heard are open to the hearer, except that he must not arrogate

the deceased's handwriting passed under the words "personal estate" to his executors.—*Atcherley v Vernon*, 10 *Mod.* 529.

¹ *Abernethy v Hutchinson*, 1 H. & T. 39; *Turner v Robinson*, 10 Ir. Ch. R. 121, 510. See also *ante*, p. 29.

to himself what was never intended to be conferred on him, namely, the valuable right of publication. Thus Mr. Abernethy, a surgeon at St. Bartholomew's, sought to restrain a proprietor of a medical newspaper from publishing his lectures, which he had delivered to students. The lectures were extempore. Lord Eldon granted the injunction on the ground, that there was an implied contract by the auditors not to publish such lectures for profit, as they had only the mental use of the lectures enjoyed by hearing them delivered.¹

As, however, considerable doubt attended this state of things, the legislature intervened, and while it expressly conferred, or rather recognised, a copyright in the lecture as subsisting in the author or his assignee, it imposed a penalty on all persons who should piratically publish the same, besides forfeiture of the copies printed.² Such Act expressly declares, that no person admitted on payment, or otherwise, as one of the audience or as a publisher of a newspaper, to hear such lecture, shall have any implied authority to publish the lecture.³ And a printer or publisher, who without leave publishes in his newspaper such lecture, is expressly made liable to the penalties. But in order to secure the protection of this enactment the lecturer must, two days before the delivery, give notice to two justices living within five miles of the place of delivery. Nor does the enactment affect lectures delivered in any university, school, college, or public foundation, and the law as to these excepted cases remains as if the Act had not passed.⁴ The remedy, therefore, provided by this statute being dependent on two days' preliminary notice to justices of the peace, a precaution seldom taken, is probably in few cases available, and hence the law remains for most purposes as if the statute had never passed.

Right of property in unpublished letters.—The right of property in unpublished letters, or the mutual position of the writer and receiver of such letters as regards all subsequent dealing with them, has been confused by mixing up the question of the ownership of the paper on which the letter is written with the other questions. In considering this question apart from rules of law and as a

¹ *Abernethy v Hutchinson*, 1 H. & T. 39; 3 L. J. Ch. 209.

² 5 & 6 Will. IV. c. 65. ³ *Ibid.* §§ 2, 3. ⁴ *Ibid.* § 4.

mere question of fact, or of the universal understanding of mankind, which is equivalent to fact, the situation of parties seems to be as follows. When one person writes a letter to another it is not to be assumed, that he considers the value of the paper as of any consequence. It does not enter into his contemplation as an element of what he is doing, and nothing can possibly turn in his view on the ownership or subsequent destination of that paper. But he considers the contents of the writing as a communication to be the sole thing in hand. He is making a certain communication of his ideas in the way of carrying on the business of life, whether in the shape of dealing with property or gratifying his feelings of friendship, or indignation, or curiosity. But he makes the communication to the correspondent personally, unless the contents show that he makes it otherwise. He does not authorise the correspondent, either immediately or at any future time, to publish the contents, or even communicate such contents to third parties; and the correspondent must—apart from any questions of libellous letters—take the risk of doing so. Such being the common understanding of mankind with respect to letters and written communications, the law, in dealing with that state of facts, seems to view the subject in the following light. The mere property in the paper on which the letter is written has no bearing whatever on the mutual relations of the parties. Whether the correspondent on receipt puts the letter in the fire, or first copies the contents and then destroys the original, or after destroying the original rewrites from memory the substance on paper, or keeps the document in his possession for life, can make no difference, and the position of parties would remain unaltered. Again, the communication being made for a limited purpose, namely, to the correspondent for his personal use, there is nothing inconsistent in the latter further communicating the contents in whole or part to one or more individuals, this being within the ordinary discretion which is inherent in all men in the course of their mutual dealings. But the purpose of the communication when once made to the correspondent being served, it has fulfilled its office so far as he is concerned; and the further right of dealing with the communication either in the way of

keeping it secret or publishing it to all the world—either for purposes of gain, of vanity, benevolence, or other lawful motive—must necessarily remain in the writer, for there is nobody else in whom any interest can be discovered, or traced, or to whom it has been transferred. If, therefore, the correspondent, without the consent of the writer, takes upon himself to publish the contents, he is doing something which he was never authorised to do by the writer, and is interfering with that further reversionary and absolute right and discretion, which inheres in the author, of further dealing with the letters as he pleases, and of treating them either as objects of literary value and a means of profit, or destroying all recollection of them so far as he could do so consistently with the correspondent's limited user.

Whether letters are joint property of writer and correspondent.—Again it will be seen how fallacious and confused is the notion, that there is a joint property in the letter between the writer and receiver, and that neither can do anything as regards it without the consent of the other. This arises from confounding the fate of the mere paper with the substantial thing which is the medium of communication. The correct rule seems to be, that the paper belongs absolutely to the receiver, but the letter, or means of communication, belongs absolutely to the writer, subject only to the limited user of the contents for the receiver's personal benefit. At first the courts were not a little puzzled how to treat the mutual rights of those who sent and who received letters of a private nature. Lord Hardwicke, however, in 1741, when deciding the case of Pope, who sought to restrain a publisher from publishing letters to and from the poet, held, that it was a mistake to suppose, that the writer of the letter made a gift to the correspondent of his writing for all purposes. He might give away the paper, but the words written on it were not given absolutely. The receiver had only a special or limited property in these, and the radical right to them for publication remained in the writer. Hence Pope was held entitled to prevent publication of the letters he himself wrote, but not of the letters he received.¹ And the same doctrine was held as to Lord Chesterfield's letters.²

¹ Pope v Curl, 2 Atk. 342.

² Thompson v Stanhope, Amb. 737.

It has sometimes been said that the common letters exchanged between people are too petty to be dignified as literary compositions, or to be entitled to be subjects of copyright, and therefore that there is no copyright in them.¹ But remarks on subjects, however common-place, have so many points of view from which they may be regarded, and may, from unseen circumstances, become so important at one time, though not at another, that no court could safely take on itself to draw the line and separate the important from the unimportant, or the literary from the non-literary. The court may well treat all written communications as *prima facie* capable of copyright, subject to the rule which applies to this as to all other departments of the law, namely, that if from the subject matter or the expression they are of no importance, then the court will treat them as non-existent and refuse to protect them in any way, using as its excuse the maxim—*de minimis non curat lex*.

While the property or copyright in the letter sent to a correspondent is *prima facie* in the sender, and the receiver has *prima facie* only a special or limited use of such letter, this latter special use may vary with the subject matter, and the receiver may, for purposes of vindication of character, or otherwise, be impliedly entitled to publish it. The reason of this seems to be, that if a sender of a letter put the receiver in such a position that nothing less than publication will serve the lawful purpose of self-protection, then this limited right of publication must be taken to have been contemplated by the writer, and his consent impliedly given, and he cannot set up his copyright in order to restrain such use. But for all other general purposes of publication the sender retains his copyright in the letter he has written.² There is also a distinction as to the ownership of the copyright of letters, owing to the relation of master and servant. If a servant or clerk write a letter on the business of the employer, then the copyright of that letter belongs to the employer and not to the servant.³ One other point as between correspondents turns on the nature of the special property or use which the receiver has. It is obvious that that use

¹ Per *Plumer*, *V. C.*, *Percival v Phipps*, 2 V. & B. 19. ² *Percival v Phipps*, 2 V. & B. 19. ³ *Howard v Gunn*, 32 Beav. 465.

includes the permanent retention by the receiver of the paper, as well as the letter itself, and whether the receiver afterwards returns the original to the writer and keeps a copy, or whether he returns that original without keeping a copy, his right remains the same. He must have been intended by the writer to keep the original letter permanently, and hence the writer cannot demand the original back. If the writer has retained a copy of the original letter, he may use it for purposes of publication, but he cannot compel the receiver to give up such original at any time or in any circumstances. Yet some of the cases confuse this subject.¹ The result, therefore, is, that in respect of private letters the ownership of the paper is of no account, and therefore belongs to the receiver, who is entitled to its possession, and can recover it even from the writer to whom it has been lent, while the substantial right or the copyright remains undivested in the writer.²

Publishing letters without writer's consent.—Where the receiver of letters, or any other person, has, without the consent of the writer, published, or threatened to publish, such letters, the latter may obtain an injunction from the court.³ It is true that the court seems to have granted this relief on the professed ground of there being a breach of trust, but it would be more correct to hold the act as a tort or violation of the owner's right to do what he pleases with his own letter or communication.⁴ There may, however, be sometimes an express contract between writer and receiver, and the breach of that contract by the latter may be a ground also of the court interfering to restrain publication.⁵ There may also be cases in which the receiver of a letter may be entitled to use it, as already stated, for some purpose of vindication or self-defence, in which event the publication may be excused.⁶

Copyright in letters to newspapers, public offices, &c.—It has been said that a letter addressed to the editor of a newspaper for publication or otherwise is the sole

¹ *Gee v Pritchard*, 2 Swanst. 415. ² *Oliver v Oliver*, 11 C. B., N. S. 139. ³ *Pope v Curl*, 4 Burr. 2330; 2 Atk. 342; *Thompson v Stanhope*, Amb. 737; *Gee v Pritchard*, 2 Swanst. 426. ⁴ *Percival v Phipps*, 2 V. & B. 19; *Gee v Pritchard*, 2 Swanst. 402; *Clarke v Freeman*, 11 Beav. 112. ⁵ *Percival v Phipps*, 2 V. & B. 23, 27.

⁶ *Howard v Gunn*, 32 Beav. 462.

property of the editor, but there seems no reason for any difference in the rule applicable. The receiver in all cases may keep the letter or burn it, or he may publish it, having the writer's leave to do so. But as neither party contemplated republication in another form, there seems no reason why that radical right should not remain undivested in the writer.

Who is an author, and what is literature?—Though the Act of 1842 describes its object to be to encourage the production of literary works of lasting benefit to the world, it is not possible to define very accurately what amounts to literature, or how far it is likely to be lasting, or who is entitled to be called an author. Nor indeed was or is this necessary. No court can be expected, any more than the legislature, to have any peculiar faculty for singling out the literary element. It would have been better, as indeed it is practically the only alternative, to treat as literature every kind of writing or order of words which is capable of being printed or published—is saleable or intended to be so. Though this view gets rid of every attempt to appraise literary merit, and confines the law, as it is in other cases, to the protection of the order of words merely, in so far as these may minister to the profit of the maker or collector, and treats literary fame as a thing too subtle to be within its cognizance, yet the result will be, that all literary works of value will be in effect protected, seeing that it is not usual for mankind to be curious or covetous to acquire books which are destitute of thought, and are of no value, and ought never to have existed in a published form. Though the word “author” is the descriptive name of the person from whom the efficient merit of a published work proceeds, and he cannot be defined without the same difficulty as the word “book,” there are cases in which it is necessary to fix upon one person out of several who have been mixed up with the production of a book, and say which is in the eye of the law the author. If, for example, one person suggests, and intends to act as publisher, while the other supplies the design and execution, and from whose brain the originality, if any, comes, then the latter is the author.¹

¹ *Shepherd v Conquest*, 17 C. B. 444.

First publication in United Kingdom.—The Copyright Act of 1842 expressly applies to every book which shall be published, and as no further precision is given to the word “published,” the courts had to decide that that word means “published for the first time in the United Kingdom.”¹ And if the author is a British subject, it is immaterial in what foreign country he resides, provided he comply with the statute by first publishing in the United Kingdom. The legislature seems to have thought it a sound rule, that he who first published a MS. abroad would not be entitled to any copyright of the same in this country.² And if an English author first publish his book abroad he must pursue the same steps as are laid down for foreign authors under the International Copyright Acts. If there is no treaty convention with the foreign country, then he can in such case acquire no copyright in this country if he first publish in such foreign country.³ But if there is such treaty, then he receives such protection as the International Copyright Acts supply. But as regards works first published before 1843 an alien residing abroad was held not entitled to copyright, though he first published in this country; for it was said that he owed no allegiance to this country, and the Act of Anne, c. 9, was not passed to confer the privileges of an English subject on aliens.⁴

On the the other hand, any foreign author who resides in any part of the British dominions at the time of his first publication of a book in the United Kingdom acquires the same rights as a British author.⁵ And such was the case where a native of the United States went and resided in Canada for a few days while the book was first published in the United Kingdom.⁶ But if the publication here and abroad is simultaneous, the same protection is given to the publication here as if it had been first exclusively published here.⁷

International Copyright Acts.—While copyright has, as already explained, with difficulty been recognised as property in this country, and the common law right has been confiscated and superseded by a temporary right for a limited time,

¹ 5 & 6 Vic. 45, § 3. ² 7 Vic. c. 12, § 19. ³ *Boucicault v Delafeld*, 1 H. & M. 597. ⁴ *Jeffreys v Boosey*, 4 H. L. C. 985.

⁵ *Routledge v Low*, L. R., 3 H. L. 100. ⁶ *Ibid*. ⁷ *Cocks v Purday*, 5 C. B. 860.

the same right as between nation and nation has been still more arbitrarily ignored. When a ship belonging to a British subject drifts on a foreign shore, the citizens of that foreign country are nowhere now encouraged by their own legislature and courts to view it as a wreck or prize—to scramble for the masts and tackle, and to seize the cargo and divide the spoil as if it were a windfall. And yet when a book of a British subject is sent or taken to a foreign country, there is a singular unanimity among nations in this barbaric notion they act upon. It is true there was a stage of progress in all countries, when nothing was believed to exist, except what could be weighed and measured and handled and eaten. Each civilised country, forgetting its progress in other things, still professes that it cannot discover who is the foreign author entitled to the valuable right of reprinting a book that reaches them; and therefore that there must be no author at all and no proprietor; and therefore that the first finder may at pleasure seize and appropriate it. Such, indeed, was the early faith of barbarians in so far as regarded the property of foreigners which came within their own country. It was only by degrees that legislatures began to generalise, and surrender the predatory instinct. They have long learnt, that such practices were incompatible with civilisation and the very elementary principles of all property, except copyright. It is true that in very modern times a kind of international code has sprung up, as if civilised people were inclined voluntarily to remedy some glaring defects in such conduct. By virtue of special treaties some countries now agree to recognise and give effect to the copyright of each other's citizens, and put the rights of foreigners as in most respects on the same footing as those of natives, upon each author complying with certain conditions. Such statutes have existed for forty years in Great Britain, and there are treaties in existence between some of the leading countries of the world which give effect to these new views; and they also contain provisions protecting authors against translations without their consent, and protecting also sculpture and works of art, as well as dramas, music, engravings, paintings, and photographs.¹

¹ 7 & 8 Vic. c. 12; 15 & 16 Vic. c. 12; 25 & 26 Vic. c. 68. International copyright conventions were made between Great Britain on

for it is a sheet of letterpress.¹ It cannot be said correctly, that a newspaper does not come within those words,² nor within the words "periodical work," in the 19th section. Whatever may be the position of a newspaper as regards copyright in its contents, the court will protect the proprietor against imitating the title of the paper.³ The sole reason why actions and injunctions for infringement are seldom resorted to is the extremely ephemeral nature of the contents; for before any remedy is applied the memory of both the subject of copyright and its infringement will usually have perished. But no other consideration seems to preclude the same remedies as if the newspaper were a book.

If MS. or book is immoral, or blasphemous, or seditious.—Though the writer of an unpublished MS. either has a right of property in the document, or has the right to mature it and so ultimately render it a subject of property by publication, this must be taken to be subordinate to the general rule, that the document must not contain in itself something so mischievous in tendency as when published to subject its publisher to indictment or other punishment for blasphemy, or indecency, or gross immorality, or sedition. If such is the case, no person can claim to be treated by any court of law or equity to protection or assistance as its owner or *quasi* owner. Thus where in the Birmingham riots Dr. Priestley's house was demolished and his MS. destroyed, it was held or assumed that he could claim no compensation for a manuscript, for when published it would tend to incite people against the Government.⁴ Thus the Court of Chancery refused at the instance of Southey, the author of *Wat Tyler*, to give the usual relief of injunction against the person who published it.⁵ The standard, however, of what is libellous or blasphemous may vary according to the state of civilisation and the progress of education, and what was once deemed, whether by judges or juries, libellous, as reviling the Scriptures or constituted authorities, may no longer be so treated. Thus the judges in Chancery in 1822 and 1823 treated Lord

¹ 5 & 6 Vic. c. 45, § 2. ² *Cox v Land & Water*, L. R., 9 Eq. 324. ³ *Kelly v Hutton*, L. R., 3 Ch. Ap. 708. ⁴ *Priestley's Case*, 2 Meriv. 437. ⁵ *Southey v Sherwood*, 2 Meriv. 438; *Lawrence v Smith*, 1 Jac. 471.

Byron's *Cain* and *Don Juan* as incapable of their protection.¹ And for a like reason a court will not grant an injunction to restrain the publication of a work which is immoral or indictable or actionable, the publication being left to be punished by another proceeding. It is true that Lord Macclesfield, L. C., thought it the duty of the Court of Chancery to restrain such works, so as to prevent further daily mischief extending.² But the court has since thought, that it was no part of its business to interfere merely to prevent a crime being committed.³ One of the inevitable consequences of a work being libellous in the above senses is, that no action can be brought to recover the value of any kind of work done upon it, whether for printing or publishing. If such prints are sold the seller cannot recover the price; if they are about to be pirated the court will not restrain the pirate; if they are sold and paid for, the purchaser cannot recover back the price paid, at least if he knew the nature of the work he was buying. This head of law is not, however, peculiar to libels, but accompanies all kinds of immoral and illegal acts, which are said to be against the policy of the law.⁴ And precisely the same reason applies, where the publisher of a work which is falsely represented to be the work of a popular author, and the sale of which is more or less in the nature of an attempt to obtain money by false pretences; in such a case the first publisher could not establish a copyright, and therefore the court will not interfere to protect him, and there can be no reason for any court to interfere to protect one pirate against another pirate.⁵

Date of publication.—The length of copyright depends on the date of publication, but this date is sometimes a point difficult of ascertainment. Thus the acting of a drama is no publication of the words;⁶ nor is the unauthorised publication of a piece recomposed from memory, or notes, or hearing the MS. read.⁷ Nor is the lithographing of copies to give to a few friends;⁸ though such gratuitous

¹ Murray v Benbow, 1 Jac. 474 n.

² Burnett v Chetwood,

2 Meriv. 441.

³ Prudential Co. v Knott, L. R., 10 Ch. 144.

⁴ Stockdale v Onwhyn, 5 B. & C. 173; Poplett v Stockdale, Ry. & M. 337.

⁵ Wright v Tallis, 1 C. B. 893.

⁶ Coleman v Wathen,

5 T. R. 245.

⁷ Macklin v Richardson, Amb. 694.

⁸ Prince

Albert v Strange, 1 Mac. & G. 25.

circulation of printed copies among a private society may well amount to an infringement of the author's right by some other person.¹ And as in the case of books, it is sometimes difficult to decide what is the date of publication of a picture. It was held, that the mere publication of an engraving of a picture in a magazine was no publication of the picture; nor was the exhibition of the picture at the Royal Academy any such publication.²

Registering book under Copyright Act.—The Act provides for a register being kept of the owners of copyrights at Stationers' Hall, which is to be open to the inspection of the public on payment of a small fee.³ A certified copy of such entry is *prima facie* evidence of the proprietorship or assignment of the copyright, or in case of dramatic or musical pieces of the right to represent or perform such pieces, the insertion of a false entry being punishable as a misdemeanour.⁴ If the author has arranged with publishers as to publication, all of them, both authors and publishers, may be jointly entered as owners.⁵ If there is an entry of joint owners both may sue. If the copyright was assigned before publication, then the person properly to register the book is the assignee in his own name.⁶ The particulars stated in the registered entry of copyright must be perfectly accurate as to dates and names, otherwise the protection of the Act does not attach to the book.⁷ And this is so, though the omission or error was the fault of the officials and not of the author.⁸ It is essential that this register should state the exact date of first publication, namely, the day of the month and year.⁹ The place of abode is also necessary, but if the author is abroad, the address of the publishers will suffice for the author's address.¹⁰ Before the Act of 1842, though the registration of the book was necessary in order to recover penalties, yet it was not necessary in order to sue in an ordinary action for infringement. But under that Act it is a condition precedent to any remedy whatever in

¹ *Novello v Ludlow*, 12 C. B. 177. ² *Turner v Robinson*, 10 Ir. Ch. R. 121, 516. ³ 5 & 6 Vic. c. 45, § 11. ⁴ *Ibid.* §§ 12, 13.

⁵ *Stevens v Wildy*, 19 L. J., Ch. 190. ⁶ 5 & 6 Vic. c. 45, § 3; *Cocks v Purday*, 5 C. B. 860. ⁷ *Low v Routledge*, 33 L. J. Ch. 717; *Lover v Davidson*, 1 C. B., N. S. 182. ⁸ *Cassell v Stiff*, 2 K. & J. 287. ⁹ *Mathieson v Harrod*, L. R., 7 Eq. 272. ¹⁰ *Lover v Davidson*, 1 C. B., N. S. 182.

respect of books published since 1842.¹ The omission of this entry in the register does not cause any forfeiture of the author's right; it merely prevents any remedy being resorted to either by action or under the statute, until the entry shall have been made.² And the entry may be expunged if its falsity is clearly proved, but not otherwise.³ And the person so applying must always have some real interest and be really aggrieved.⁴ There is nothing gained by registering a book before actual publication, or by registering the title of a proposed book or periodical.⁵ And to do so will not prevent others adopting the title.⁶ For the Act protects not the intentions but the actual performances of authors and publishers. A separate article intended to form part of a periodical publication does not require registration as a book, to protect the right therein.⁷

Assignment of copyright in printed books.—The copyright in books, paintings, sculptures, is personalty in the eye of the law, and is dealt with in wills like other personalty.⁸ And as it has ceased to be in any sense personal to the author, there is no reason why the right of publication should not pass to the trustee in bankruptcy, as it has been settled to do with regard to a newspaper.⁹ Every owner or registered proprietor of a copyright may assign it in whole or part by any writing, either under seal or not under seal, or by an entry in the Book of Registry, according to the form of the statute, which is made equivalent to a deed, and is not subject to any stamp duty.¹⁰ The Copyright Act did not expressly state how an assignment of copyright was to be made. It states one way of doing so, namely, by entry in the register at Stationers' Hall; but this did not negative other ways, and hence the courts had to reason circuitously in order to discover another way. And this was done by inference from the enactment, that every person printing a book or MS. for sale without the written consent of the

¹ 5 & 6 Vic. c. 45, § 24. ² 5 & 6 Vic. c. 45, § 24; *Stannard v Lee*, L. R., 6 Ch. 350; *Murray v Bogue*, 1 Drewr. 364; *Hogg v Scott*, L. R., 18 Eq. 444. ³ *Ex p. Davidson*, 18 C. B. 310.

⁴ *Ex p. Walker, re Graves*, 10 B. & S. 688. ⁵ *Correspondent Newspaper Co. v Saunders*, 12 L. T., N. S. 540. ⁶ *Hogg v Maxwell*, L. R., 2 Ch. Ap. 316. ⁷ *Mayhew v Maxwell*, 1 J. & H. 312. ⁸ 5 & 6 Vic. c. 45, § 25; 25 & 26 Vic. c. 68, § 3. ⁹ *Re Baldwin*, 2 De G. & J. 230; 32 & 33 Vic. c. 71, § 15. ¹⁰ 5 & 6 Vic. c. 45, §§ 13, 14.

author shall be liable for piracy.¹ It was thus inferred by the courts, that the consent of the proprietor to the publication of the work must be in writing, and if the origin of the right was to be by writing, it was inferred that the assignment must have been also of the same species of evidence.² And the assignment may be validly made by an agent of the author in writing,³ though that agent was not appointed by writing, as is required in the case of copyright in paintings and drawings.⁴ In cases where the assignor has copies of the work printed, but unsold, at the time of the assignment, and there is no special contract as to these, they do not pass to the assignee, and the assignor may after the assignment continue to sell them.⁵ An assignment may be made for a limited portion of the full term only, or for a limited number of copies, as for example the first edition, after which the author's right revives.⁶ But the assignment cannot be confined to one locality only, or parcelled out in that way, it being construed to mean one indivisible right in this respect.⁷ And any other doctrine would make it practically impossible to obtain redress for infringement. And when the agreement between author and publisher is for the latter to print a certain number of copies and account to the author for the price, this is an implied assignment to the publisher while those copies are unsold.⁸ And yet if there is no definite term, a like agreement will not be treated either as an assignment of copyright or an irrevocable licence by the author, but merely as a joint adventure which either of them can terminate at pleasure and then divide the profit and loss.⁹ And *prima facie* whatever arrangement be made as to dividing profits, there must be an express assignment to deprive the author of the radical right which he has to the copyright of the original work he produces; or at least sufficient ground to justify a court in compelling him to complete such assignment either for the whole or a

¹ 5 & 6 Vic. c. 45, § 15. ² Davidson v Bohn, 6 C. B. 456; Leyland v Stewart, 4 Ch. D. 419. But a receipt for the purchase-money would be no evidence of the assignment.—*Lover v Davidson*, 1 C. B., N. S. 182. ³ Moreton v Copeland, 16 C. B. 517. ⁴ Ibid. ⁵ Taylor v Pillow, L. R., 7 Eq. 418. ⁶ Reade v Bentley, 4 K. & J. 656. ⁷ Jeffreys v Boosey, 4 H. L. C. 938, 940, 993. ⁸ Sweet v Cater, 11 Sim. 573. ⁹ Reade v Bentley, 3 K. & J. 271; 4 K. & J. 664.

portion of the term.¹ Though an author cannot sue till he has registered the work, an assignee of a copyright is not precluded from bringing an action for infringement by not inserting his name in the registry, for the statute merely specifies one mode of assignment.² There was no necessity, before 1843, that the assignment in writing should be attested,³ though it has been decided that since that statute the assignment must be in writing.⁴ This entry at Stationers' Hall must set forth the name and abode of the assignee.⁵

When author has not the radical copyright.—Though as a general rule the authorship of a composition is to be distinguished from the mere mechanical printing of copies thereof, and the inherent or radical copyright must remain in the author until he parts with it to another, still there may be cases where the composition is created by virtue of contract, and in that event the copyright may be vested *ab initio* in a different person from the author.⁶ A person, it is true, who merely suggests the subject, and takes no part in the design or execution, cannot be the author. But where a theatrical manager ordered from a composer certain music to suit fixed decorations and accompaniments, the copyright of the music was held, by virtue of the contract, to be the accessory right and the theatrical representation the principal right, and so that the copyright belonged to the manager.⁷ It makes no difference that an author publishes his work anonymously, for he nevertheless enjoys the same copyright as if he published his name and authorship. In some peculiar circumstances there may also be joint authors if they all concur in doing distinct parts of the work, though one may do a larger share than the others.⁸

Crown copyright.—Though the Statute of Anne recognised authors as the persons whose copyright was primarily to be protected, yet the 9th section saved the rights of the universities and others in any books printed

¹ *Hazlitt v Templeman*, 13 L. T., N. S. 593. ² 5 & 6 Vic. c. 45, § 24; *Wood v Boosey*, 7 B. & S. 869; L. R., 2 Q. B. 340.

³ *Cumberland v Copeland*, 1 H. & C. 194. ⁴ *Leyland v Stewart*, 4 Ch. D. 419; *sed quære*. ⁵ *Wood v Boosey*, L. R., 2 Q. B. 340.

⁶ *Shepherd v Conquest*, 17 C. B. 427. ⁷ *Hatton v Kean*, 7 C. B., N. S. 268. ⁸ *Marzials v Gibbons*, L. R., 9 Ch. 518; *Levi v Rutley*, L. R., 6 C. P. 523.

or to be printed. And the Crown and the patentees of the Crown have sometimes set up rights more or less amounting to a perpetual copyright, and sometimes resembling a monopoly. And courts have expressed confused views as to the origin of these exceptional rights, some referring them to the prerogative, and some to the ordinary case of the Crown being the first purchaser of the copyright or employer of the author, and thereby acquiring the copyright by contract. Howsoever acquired, there are still a few of these exceptional copyrights held by the Crown or its patentees, or by the universities as patentees or grantees. One remarkable claim once made by the Crown was to have a copyright in the publication of almanacs generally, and not merely in any one definite form of almanac. One specious reason was, that an almanac could have no certain author, and therefore it must be vested in the Crown. And the Stationers' Company professed to hold the Crown patent and to prohibit every other person publishing an almanac. And though on the strength of such a notion a monopoly was enforced for a century, it was decided by the court in 1774 to be a mere usurpation, and that such a patent was void.¹ It is true that by statute power is given to the Admiralty Commissioners to cause a Nautical Almanac to be prepared and published with tables for discovering the longitude at sea, and those who without licence publish this are liable to a penalty of twenty pounds.² And the Crown may employ a navigator to make researches and publish the result; but the order must show some person in whom the copyright vests.³ The notion that because things are of a public nature, therefore

¹ Stationers' Co. *v* Carnan, 2 W. Bl. 1004. The Stationers' Company claimed this exclusive right to print and publish almanacs, allowed by the Archbishop or Bishop of London under a patent of James I. After the Court of Common Pleas held, that the king had no right to grant any such patent, in 1779 a Bill was brought in to vest in the two universities the copyright of almanacs. Erskine was heard against the Bill, and it was rejected, though supported by the Government.—20 *Parl. Hist.* 607. The two universities of Oxford and Cambridge had also a monopoly of publishing almanacs for 150 years before 1781, and the then ARCHBISHOP OF CANTERBURY said, that he and his predecessors had regularly revised every almanac before publication.—22 *Parl. Hist.* 544.

² 9 Geo. IV. c. 66, § 2.

³ See Nicol *v* Stockdale, 3 Swanst. 687.

the Crown must have the original right, was soon seen to lead to absurdities. At last the courts drew the distinction between things of public use and things of a public nature. In one case letters patent of Charles II., granted to L'Estrange for thirty years, were set forth to support a claim to have the exclusive printing of blank writs, bonds, and indentures. The court then inclined to think the patent was not good; and that the reason of the thing showed a patent could not be valid in many other instances cited.¹ The Crown at one time also claimed the copyright in Lilly's *Latin Grammar*, on the ground of public moneys having been paid for its compilation. And a Latin Dictionary was also claimed on a similar footing.

University copyrights.—One other variation as regards the acquisition of copyright arises out of the supposed close connection of learning with the universities. A statute of 1775 conferred on the universities of Oxford and Cambridge, the four Scotch universities, and the colleges of Eton, Westminster, and Winchester, the sole liberty for ever of publishing at their own presses further copies of books bequeathed to them by the authors for purposes of learning and education.² The statute bestows on these learned bodies a copyright in such works, though such right cannot be delegated or alienated to others,³ and the entry in Stationers' Hall of this right must be made within two months after knowledge of the bequest,⁴ and a penalty is imposed on those who without authority print such books.⁵

With regard, however, to all those patents, though it is not accurate to say, that the object was not to give a source of profit to the Crown patentee or university, still this qualification is inherent, namely, that the patent shall secure a due execution of the duty. And the benefit shall be reasonable; and if an unreasonable price should be placed upon the works published, then all such

¹ E. Yarmouth v Darrell, 3 Mod. 78. ² 15 Geo. III. c. 53.

³ Ibid. § 3. ⁴ Ibid. § 4.

⁵ Ibid. § 2. The Copyright Acts did not interfere with such rights, but, on the contrary, expressly saved them from being interfered with; nor with their rights as patentees of the Crown. And the universities have long held a concurrent patent with the Queen's printers to print the Bible and Common Prayer.

authorities and patents would be put in considerable hazard.¹

Crown copyright in translation of Bible.—While Blackstone attributed the origin of the Crown copyright in the Bible partly to the theory, that the Crown is head of the Church, other authorities have attributed it to the theory, that the Crown is the guardian of the established doctrines of religion.² But Lord Mansfield pointed out a better ground, namely, that the translation of the Bible was made at the expense of the Crown.³ Letters patent in the time of 13 Elizabeth expressly vested the exclusive right of printing and publishing and selling copies of the Bible, New Testament, and Book of Common Prayer in the universities of Oxford and Cambridge and the Queen's printer concurrently; after which date no other person could lawfully print or sell such copies. And following out this monopoly, the courts afterwards held, that the Queen's printer in England could prevent the Queen's printer in Scotland from selling Bibles in England, and *vice versa*.⁴ And the same reason is given for the Book of Common Prayer, for it was not the composition of one person. All the contributors were acting either voluntarily or officially towards one result, namely, the compilation of a form of worship; and a copyright or quasi-copyright sufficient to prevent and exclude the possibility of spurious copies may well be deemed vested in the Crown, if for no better reason than that it could not be vested in any other individual. And yet as the Crown was deemed to have the copyright vested in it, only to advance and not impede the labours of the subject, any person was entitled to publish a copy of the current Bible if accompanied with notes, for the originality of the latter was sufficient to confer a copyright, though in respect of ordinary works this would be deemed an infringement. And a new translation of the Bible would be no infringement; and to publish a Hebrew or Greek Bible is also no infringement.⁵

¹ *L. Eldon, L. C., Oxford v Richardson*, 6 Ves. 711. ² *Donaldson v Becket*, 4 Burr. 2408; *Manners v Blair*, 3 Bligh, N. S. 402.

³ *Millar v Taylor*, 4 Burr. 2405.

⁴ *Oxford v Richardson*, 6 Ves. 689; *Manners v Blair*, 3 Bligh, N. S. 391. The last of these patents expired in Scotland in 1839, and in England in 1860.—117 *Parl. Deb.* (3) 953. But the Crown has renewed the patent during pleasure. ⁵ 4 Burr. 2405.

It was thought to be only carrying out the current doctrine to hold, that he who published a copy of a form of prayer which had been ordered to be read in all churches was infringing the patent of the Queen's printer.¹

Crown copyright in statutes and proclamations of State.—Another publication in which the Crown was deemed entitled to the copyright was the statutes, and the ground of this was somewhat vaguely stated. The authorship does not belong to the Crown exclusively, but to the three estates of the realm, who must all concur. At the same time it is absolutely necessary, that these statutes should be published, and published correctly, and probably as the Crown had the custody of the Parliament Roll, or because of the convenience of fixing this right and duty in some one, the Crown was *prima facie* deemed to have the copyright, or rather a right akin to copyright, and this right is exercised by the Crown patentee.² This notion, on which was founded the patent of printing statutes, was however reduced to an absurdity, when the King's printer, holding the patent to print statutes, sought an injunction against an author who had engaged with another King's printer, holding another Crown patent to print law books. That author proposed to publish a methodised digest of the statutes with notes, and the statute patentees sought for an injunction; and singular to say, instead of the Court of Chancery protecting any volunteer in doing so meritorious a work as that of methodising statutes, and if possible explaining them, the author was actually enjoined, and treated like a pirate instead of a benefactor.³ But no court would now allow any Crown copyright in statutes to interfere with works such as the above, for no prerogative can be defended, which seeks to perpetuate ignorance and confusion in any class of public documents.

Copyright in law books.—The right to publish reports of the decisions of courts of justice was once thought to belong exclusively to the Crown and its patentees, and

¹ *Eyre v Carnan*, 6 Bac. Ab. 509. ² *Ibid.* 511; *Baskett v Cambridge*, 1 W. Bl. 105, 370; 2 Eden. 137; *Manners v Blair*, 3 Bligh, N. S. 391.

³ *Baskett v Cunningham*, 1 W. Bl. 370. It is no wonder that the English statutes, protected in this way, have always excited the ridicule of those writers of the English language who have consulted them.

a patent was regularly made, authorising the printing of law books; and confused notions thereby were encouraged. One reason assigned was, that, the judges being paid by the Crown, their decisions were so to speak Crown property. This reason however has long ceased to exist, for no judge is now paid by the Crown, but by each and every member of the community, who alike contribute to the Consolidated Fund, and are entitled to the benefits obtained from its appropriations. Yet the courts so late as the reign of Charles II. treated this right of the Crown patentee as undoubted, in the case of Rolle's *Abridgment*¹ and Croke's Reports.² When the Licensing Act passed, it authorised law books to be published if allowed by the judges; but when that statute expired in 1694 there was an end for ever to this species of monopoly.

Copyright in reports of cases in courts of justice.—Since the repeal of the Licensing Act any individual who chooses to devote his time and labour to producing reports of decisions of courts of justice may not only publish them freely, but will acquire copyright in them, as in other books, provided he, by his own labour, report the decisions, so far as such decisions are spoken and not written.³ It is true if the judges deliver written judgments, they cannot themselves acquire copyright in them, for the product of their public duty belongs to all alike; and no one individual can acquire copyright in such written or published judgment, seeing that he is neither the author nor the assignee of any authors capable of transferring such a right. The reporting of cases in courts of justice has never been treated as *prima facie* a contempt of court, though, as regards the House of Lords, peculiar reasons exist, owing to its being by turns part of the Parliament as well as a court of justice. Each House of Parliament has its own views as to this subject, as has been noticed more conveniently in another chapter. The House of Lords has also claimed the exclusive right to publish or license the publication of

¹ Carter, 89; Bac. Ab. Prer. F. 5; 4 Burr. 2315.

² Skin. 234; 1 Mod. 217; 4 Burr. 2316.

James I. had granted a patent to print law books, and his successors continued such patents.—*Skin.* 234; 4 Burr. 2316. The vagueness of the term "law book" would alone vitiate such a patent according to modern notions.

³ *Sweet v Benning*, 16 C. B. 459.

reports of trials that take place before it, while it acts as a Court of Parliament; and in the case of Lord Melville's trial in 1776 a publisher, other than the licensee of the House, was restrained by injunction, at least until the hearing of the case.¹ And in each case at least of state trials, the House has usually appointed a particular publisher; and if the House treats the publication by others as a breach of privilege, no court can in any way interfere or protect the unprivileged reporter. A court of law, it is true, as has been already explained, may fine or commit for contempt any one who so publishes a report as to interfere with the efficient administration of justice; but this power is inherent in courts of record for purposes of justice and to prevent abuse, and not from any notion of copyright.² The ordinary courts of law transact their business in public, and publicity being the essence of nearly all their decisions, it was not likely that any such court would claim any exclusive right of publication; for this publicity cannot be secured, unless every person can, at discretion, publish an account of what takes place, and which does not tend to interfere with, or prejudice, a pending matter.

Infringement of copyright generally.—The copyright of a work means the exclusive right to publish and sell copies, printed or otherwise, because this is the only profitable use in contemplation of the author, and in many cases is the inducing motive of his expending his labour or genius. If another person were to be allowed to republish the copy, embodying the same order of words, which is the characteristic mark of property, this would deprive the author of the natural fruits of his labour. In 1774 the majority of judges held, that the exclusive right to publish continued unaffected by the publication, and that an action at law will lie at the instance of the author or his assignee to recover damages for such infringement of copyright. Nevertheless, in judging what amounts to an infringement, some distinctions are to be kept in mind, for there are various ways of infringing the right besides printing duplicate copies, though that is obviously its most injurious form, and at the same time involves less labour to the infringer.

¹ Gurney v Longman, 13 Ves. 493. ² See *ante*, p. 129; R. v Clement, 4 B. & Ald. 219; R. v Fleet, 1 B. & Ald. 379.

When a legal right like copyright is violated, some attention must be given to the nature and extent of such rights. When an author publishes a book, he cannot avoid giving to each and all his readers the benefit of the thoughts and knowledge it suggests and imparts. He cannot prevent people thinking and speaking about it and commenting upon it, either in writing or in print; and indeed he must have expressly contemplated this as the natural consequence of the act of publication. He cannot prevent people turning his thoughts to some advantage. Indeed, the speculative consequences of the publication lie altogether out of the range of the law, and cannot in any way be intercepted, modified, or suppressed. But what the author did not contemplate and intend was, that a third party should, without his consent, multiply more copies and sell and derive profit from, or even without profit publish any further copies. This is a matter kept exclusively to himself, and which he in no way intended to part with. When, therefore, it is necessary to decide, what is or is not a violation of an author's copyright, one must leave altogether out of view its speculative and literary effect on the minds of others, and concentrate attention on one thing only, namely, the exclusive right to multiply copies, with or without profit, which is the essential and substantial legal right known as copyright. Whatever interferes materially with this right is a cause of action; it is not deemed so grave as to be a criminal offence, seeing that ample amends can be got by the combined effect of an action for damages, coupled with delivering up of copies forfeited, and coupled with an injunction to restrain publication for the future.

The publication of a book does not and cannot interfere with the labours of others on the same or similar subjects. All men have the right to write upon subjects, new or old, regardless of what others have already done. Any number of poets may write a poem called "*Paradise Lost*;" and any number of historians may write a *History of England*, and may give expression to the same ideas, describe the same subjects and draw the same conclusions from nearly the same materials. But the copyright in a book is sufficiently ear-marked to be distinguished and set apart from all other property, and if so must have the same protection

from the law as other property. The question between the author and his piratical imitator is not a question of the mere relative amount of labour expended by each, for the pirate may in that respect sometimes excel his original. It is merely a question, whether property which has been created and ear-marked is to be lessened in value and depreciated in the only way in which it can be depreciated, namely, printing duplicates of the same order of words, or by a spurious imitation professing to be the same thing or something better, and so interfering with the original author's reaping the natural fruit of his own labour.

The manner of executing the infringement is not material, so long as it can be described as a mode of multiplying copies. If the print were photographed, or copies obtained otherwise than by printing, the multiplying of such a copy would be complete and an invasion, though the copies were not made with a view to profit.¹ And infringement is not the less an infringement that it may have been unintentional.² It is an infringement for a person to publish what purports to be a continuation of a work which has been previously only partly published, for it is a fraudulent misrepresentation, affecting both the author and purchaser.³

Copyright in Directories and quasi-mechanical books.

—Some books, such as gazetteers, grammars, maps, itineraries, directories, law lists, arithmetics, almanacks, concordances, cyclopædias, guide-books, are entitled to the same protection as literary works, because, as already stated, they have usually required some kind of labour by way of verifying and collecting facts; and it is chiefly in the case of alleged infringement, that questions of difficulty arise between prior and subsequent publications of the same kind.⁴ Where a person undertakes labour in collecting statistics and names, which any one may do, and publishes the result, he is entitled to copyright, and whoever publishes the same results, as may be done by simply copying the preceding work, will usually require to satisfy the court, that he went through much the same independent labour, to sustain his own title to the same kind of

¹ 5 & 6 Vic. c. 45, § 2; *Novello v Sudlow*, 12 C. B. 189.

² *Scott v Stanford*, L. R., 3 Eq. 723. ³ *Hogg v Kirby*, 8 Ves, 215. ⁴ *Mathewson v Stockdale*, 12 Ves. 270.

work.¹ And yet a directory already published may be used as a guide towards verification, and which necessarily may shorten such labour, for this is a consequence of a first publication which cannot be avoided.² Even a catalogue of saleable articles, if accompanied with descriptive or illustrative matter, is entitled to protection, whenever there is something peculiar to distinguish it from like representations of what every one has to sell.³

Infringement of copyright by books on same subject.—Where one author has acquired copyright in a book on a particular subject, he cannot prevent other authors dealing with the same subject even in a similar way. Nevertheless it becomes a question with courts, whether the ideas and expressions of a previous author have been substantially pirated, for the thoughts may often be so original, striking, and in a manner ear-marked, that even though the language is varied, yet there may be piracy in the leading ideas and method displayed. No rule can be laid down on this subject any more than on other departments of the law where similar matters are involved; and questions of literary piracy have this peculiarity, that they usually come to be decided by judges or by juries who generally have not the knowledge and training best adapted for the solution of this kind of difficulty. Courts have sometimes tried to express something like a rule or formal way of ascertaining the degree at which piracy begins and the fair literary use ends. There are numerous ways of expressing something like a rule suggesting a test, but they are all mere variations of words, and do not advance the comprehension of the radical notion; and judges differ as to their estimate and as to where the line is to be drawn.⁴ Some judges talk of the vital part being abstracted. And at one time it was described as if there must be an *animus furandi*. But judges have little practical difficulty in deciding the point.

Infringement by copying title of book.—There is also another mode of infringing copyright, namely, by using an identical title or name already used to describe a prior

¹ *Morris v Ashbee*, L. R., 7 Eq. 34; *Kelly v Morris*, L. R., 1 Eq. 702.

² *Morris v Wright*, L. R., 5 Ch. Ap. 279. ³ *Hotten v Arthur*, 1 H. & M. 603; *Cobbett v Woodward*, L. R., 14 Eq. 407; *Grace v Newman*, L. R., 19 Eq. 623.

⁴ *Pike v Nicholas*, L. R., 5 Ch. Ap. 251.

book, periodical, or newspaper; and this is substantially the same kind of interference with the property in a prior copyright as any other, for it tends to induce a purchaser to buy another book by mistake and so take away all motive from buying the original, which is the essence of all copyrights. Hence where a man announced his intention to publish "*The Wonderful Magazine, a new series improved,*" and that title had already been part of a prior work which the author had no intention to continue or connect with another, the court granted an injunction to restrain it, as it might mislead people into thinking it was the plaintiff's.¹ This mode of infringement most usually occurs in the case of periodicals and newspapers, and sometimes a title is slightly changed, but the court will look to the probability of the public being deceived into the belief that the new publication is the same as the old.²

Infringement of copyright by way of a review.—The mode of commenting on a book by way of a review is a legitimate exercise of the mind and intelligence of a reader, which no author can complain of in a country where literature is free. Indeed this he rather invites, and must contemplate, as a natural consequence. And yet under the guise of a review the reviewer may quote so largely and describe and abridge so completely, that the result may be an actual infringement of copyright; for if a reader of a review is able to obtain in another and shorter form all the same distinguishing features and results without availing himself of a reading of the original work, this is only evidence of the copyright having been substantially infringed and of a substitute being provided, or at least of a main inducement for purchasing the original work being taken away.³

Infringement of copyright by adding notes.—And a somewhat similar abuse of comments in the form of notes will be found, where an author's work may be accompanied or interlarded with these. It has sometimes been hastily said or assumed, that if one author print another's work accompanied with original notes of his own, this will

¹ *Hogg v Kirby*, 8 Ves. 215; *Longman v Winchester*, 16 Ves. 271.

² *Chappell v Davidson*, 2 K. & J. 126; *Weldon v Dicks*, 10 Ch. D. 247.

³ *Mawman v Tegg*, 2 Russ. 393.

be no infringement.¹ But this cannot be maintained, for no proportion of accompanying notes will prevent such a reprint of an author's book being an infringement, and the *bona fides* of the annotator is wholly immaterial. Indeed, the better the notes, the worse the infringement.² And, for the same reason, to publish a book with the addition of plates or illustrations of any kind is in the same position, for this is equally an infringement.

Infringement by way of abridgment.—Another mode of infringement is by way of abridgment, and on this subject judges have sometimes affected sympathy with such a mode of infringement on account of its so called public utility. But if utility were any guide in such a question, few works were ever published, that could not, in skilful hands, be slightly varied and made much shorter, cheaper, and better in all respects than the original form in which the authors happened to place them before the public. Though something turns on the degree and relative quantity of the abridgment, yet *prima facie* it is a mode of infringement, if it materially supersedes the desire of readers to purchase the original.³ Lord Hardwicke first laid down this rule, but the utmost he said was, that in some cases an abridgment might show invention, learning, and judgment, and could not be deemed an infringement of copyright. And he added, that such cases could not be properly disposed of by a jury, but ought to be referred to persons of learning and ability to report upon.⁴ Hence in such a question the trouble and skill of the abridger have nothing whatever to do with the matter; they rather make the infringement more substantial and fatal to the author of the original work.⁵ And it requires to be remembered, that pirates often display great ability, and their chief misfortune is, that such is entirely misplaced. If their ability had been directed to an honest attempt to write an original

¹ *Martin v Wright*, 6 Sim. 298.
² *Saunders v Smith*, 3 M. & Cr. 711; *Campbell v Scott*, 11 Sim. 31.
³ *Tinsley v Lacy*, 1 H. & M. 747.

⁴ *Gyles v Wilcock*, 2 Atk. 142. In another case, LORD APSLEY, L.C., said he and Justice Blackstone had considered the subject and spent several hours discussing it, and thought there were cases where abridgments were really new books, and could not be treated as invasions of copyright.—*Lofft*, 775.

⁵ 3 Swanst. 681.

work, they might have succeeded quite as well as by carrying off large handfuls from their neighbour's heap. The distinction sometimes drawn between a *bonâ fide* and a colourable abridgment is altogether misleading; the sole question being, whether the reader or possessor of the abridgment will be so materially induced to dispense with the original as to cause a substantial injury to the author's copyright.¹ That kind of abridgment consisting in head-notes to legal reports if original, and deduced from the reports themselves, is a material part of the whole report, and to copy such head-note is therefore an infringement.² And for a like reason the copying of prints accompanying an original work is an infringement, because the copyright covers the work and every part of it.³

Infringement by importation of pirated copies.—One obvious mode of infringing copyright is to import and sell copies which have been printed abroad, and which could not be prevented from being so printed. And this is so glaring and destructive a proceeding, that it is made an offence punishable by summary conviction before justices. Whoever imports into the British dominions for sale a copy of a copyright book, which copy has been printed out of the British dominions, and whoever knowingly sells or possesses or exposes for sale such copy, not only forfeits the book, but is liable to be convicted in respect of each book in a sum of ten pounds and double the value of the book. Half of the penalty goes to the proprietor of the copyright, and the other half to the Customs officer who seizes the copies, which he has power also to destroy.⁴ But to obtain this protection, and to assist Custom House officers, notice of copyright books must be sent to the Customs officers, who expose such list to public view. And to prevent false entries a judge at chambers may on complaint expunge an entry from the list at the expense of the party wrongfully causing the entry.⁵ All copies unlawfully imported are deemed the property of the registered

¹ LORD CAMPBELL said the law had gone too far in tolerating abridgments.—(5 *Camp. L. Ch.* 55.) And V. C. WOOD said the same.—*Tinsley v Lacy*, 1 *H. & M.* 747; *Scott v Stanford*, *L. R.*, 3 *Eq.* 723.

² *Sweet v Benning*, 16 *C. B.* 484; *Butterworth v Robinson*, 5 *Ves.* 709.

³ *Bogue v Houlston*, 5 *De G. & Sm.* 267. ⁴ 5 & 6 *Vic.* c. 45, § 17. ⁵ 39 & 40 *Vic.* c. 36, §§ 42, 44, 45.

proprietor of the copyright, who may sue for the same or their value.¹ And he may demand an account of the gains and profits made by the infringement.² And he may obtain an injunction against selling more of the pirated copies.³

Interferences with copyright by reciting or dramatising.—As the law treats as beyond its limit the literary effect or use made by readers of a copyright work, there are a few instances in which copyright is not deemed at all substantially interfered with. If a reader choose, for profit or otherwise, to read in public or even to recite from memory another's book, he violates no right, for this is little more than reading aloud, and is rather an example of an independent kind of labour or an exhibition of a special faculty in exercise.⁴ And the court once went the length of holding, that the copyright of a drama which one would think essentially included the right of acting it, did not include this, and could not be prevented by the author, and hence a statute was passed to cure this striking injustice.⁵ In 1834 the legislature gave to the authors of dramas what they were deemed not to have before, namely, the stage right or exclusive right of acting the play as distinguished from the mere republication of the order of words involved in it as a book.⁶ And the term of the stage right in the performance was made identical with book copyright.⁷ And the remedies are the same.⁸ The case, however, has arisen where a copyright of a novel is interfered with by turning its main incidents into the form of a play and acting it. An author who publishes his novel might well be deemed not to contemplate that conversion, for the effect may be to prevent those who witness the play to cease to care for reading the novel. It was deemed difficult to decide, whether the copyright in a novel impliedly included the right of preventing any dramatic use of the main incidents. And the court held it did not.⁹ And yet the court held, that if a copy of the dramatic

¹ 5 & 6 Vic. c. 45, § 23.

² *Delfe v Delamotte*, 3 K. & J. 581.

³ *Mayall v Higbey*, 1 H. & C 148.

⁴ *Tinsley v Lacy*, 1 H. &

M. 747. ⁵ *Murray v Elliston*, 5 B. & Ald. 657. ⁶ 3 & 4 Will. IV.

c. 15. ⁷ 5 & 6 Vic. c. 45, § 20. ⁸ *Ibid.* § 21. ⁹ *Reade v*

Conquest, 9 C. B., N. S. 755; 11 C. B., N. S. 479; *Toole v Young*, L. R., 9 Q. B. 59.

version was printed and sold as a book, it did amount to an infringement.¹ The ground on which the court refused to treat the dramatisation and mere acting on the stage of a novel as an infringement of the copyright in the order of words seems to be, that it requires a distinct order of talent to put the story into a practical drama, and hence this result was not the natural and probable consequence of publication. But in modern times, when novels and dramas have become so numerous, and so frequently act and react on each other, the legislature may well revise the statute, so as to recognise dramatisation as one of the probable consequences, and therefore include this in copyright of novels and like compositions which involve narratives of character and place. Copyright in music as in plays includes the words of the accompaniment and also the right of performing the music.² This is infringed by publishing some of the airs of an opera.³ The copyright in dramas and music thus includes the right of performance as well as the mere words or verse. Another difficulty has arisen as to music, where an opera has been turned into a pianoforte accompaniment and this last again has been turned into an opera; and it has been held that the performance of the second opera was an infringement of the stage right in the original opera.⁴

Remedy by action for infringement of copyright.—

When copyright has been infringed, the statute of 1843 expressly gives to the owner a right of action against the party who has infringed, and the defendant must give to the plaintiff before trial notice in writing of the objections on which he means to rely; and if he rely on some other person being the owner of the copyright, he must give particulars of name, and title of book, and time and place of publication.⁵ It has been sometimes said, that in the action for infringement the plaintiff must prove a guilty intent, or something like an *animus furandi*, in the defendant. But this seems a misconception. It is not what the piratical author intended but what he has done, if the thing done in effect interferes with the exclusive right of

¹ *Novello v Sudlow*, 12 C. B. 177; *Tinsley v Lacy*, 1 H. & M. 747. ² 3 & 4 Vic. c. 45, § 20. ³ *D'Almaine v Boosey*, 1 Y. & C. Ex. 288. ⁴ *Fairly v Boosey*, L. R., 4 App. 711. ⁵ 5 & 6 Vic. c. 45, § 15; *Ibid.* § 16.

a prior author, that is the cause of action, just as any collision in the street resulting from negligence or carelessness, and causing damage to another person, will be a cause of action though no actual intent to injure existed. The one author in the pursuit of his own interest so acts as to damage the property of a preceding author: and hence the cause of action resembles the cause which arises in cases of damage by negligence or carelessness. There is, it is true, the possibility of two minds having independently thought out the same subjects in much the same language and on the same plan, and yet so as to wear the appearance of one book being an imitation or infringement of the other's copyright, in which case no action would lie. And in order to test the truth of this coincidence, courts often examine the materials in order to be satisfied that it is not such a case of accidental and unavoidable coincidence. But the moment it is resolved not to be an accidental coincidence, then the motive or intent of the second author is wholly immaterial, if his book is a substantial infringement of the prior copyright.¹

Where a right such as copyright is established and another interferes with it in the only way in which it can be interfered with, namely, by printing and selling without authority duplicates or copies or imitations which are deemed to be in effect and substance the same as copies and injuring the sale of the original work, an action of damages is the common law remedy of the author or owner of the copyright. It was so held under the statute of Anne, and is expressly so declared by the statute of 1843.² The question whether lithographing copies amounted to piracy has arisen, and the court held, that he who lithographed copies for distribution was liable to an action as well as he who printed them.³ The above rule as to notice by the defendant is strictly enforced, so that if the notice has not indicated the specific objection, no evidence will be permitted to be given at the trial in support of the defence.⁴ It is not enough to say, that the copyright belongs not to the plaintiff but to some other person

¹ *Scott v Stanford*, L. R., 3 Eq. 718; *Reade v Lacy*, 1 J. & H. 527; *Lee v Simpson*, 3 C. B. 871; *Pike v Nicholas*, L. R., 5 Ch. 251.

² 5 & 6 Vic. c. 43, § 15.

³ *Novello v Sudlow*, 12 C. B. 177.

⁴ 5 & 6 Vic. c. 45, § 16.

whose name is unknown, for it is the defendant's business to find out this unknown person before acting on the speculation; or at least he must show a definite publication by some other person. And as the defendant may wish to know the extent of the damage done, so as to pay money into court, he has a right to put interrogatories to the plaintiff as to the number of copies sold by him during a limited period before and after the date of infringement.¹ It is no answer to an action for infringement that the book was printed and published without the name and residence of the printer.²

A condition precedent to the right of action is the registration of the copyright at Stationers' Hall.³ And while all actions for penalties or forfeitures must be brought within twelve months after the offence,⁴ the action for damages for infringement or forfeiture may be brought within six years.

Remedy by way of penalties for infringement.—Where the statutes give a remedy for infringement by proceedings for penalties—as for selling pirated imported copies—the penalty is incurred for the sale of each book; and hence if several sales take place on one day a separate penalty for each sale is recoverable.⁵

Injunction as a remedy for infringement.—The practice of the high court to grant an injunction to restrain piratical publications became frequent after 1734, when the first term granted by the statute of Anne ceased, and the loss of statutory protection began to be felt. The ground on which the court interferes by injunction is the inadequate remedy which an action for damages can give, for, as the damage may be irreparable, the most effectual remedy must be to prevent the publication altogether. In some cases the court balances the inconveniences and hardships of the parties, and directs the plaintiff to take his remedy in the form of damages without giving him an injunction either as an alternative or concurrent remedy. One of the qualifications of the action of injunction is, that the court insists on the plaintiff using great expedition and promptitude in resorting to the court for this

¹ *Wright v Goodlake*, 3 H. & C. 540. ² *Chappell v Davidson*, 18 C. B. 194. ³ 5 & 6 Vic. c. 45, § 24; *Murray v Bogue*, 1 Drewr. 364. ⁴ 5 & 6 Vic. c. 45, § 26. ⁵ 5 & 6 Vic. c. 45, § 17; *Exp*, *Beal*, 9 B. & S. 395.

action, the alleged ground being, that by delaying to commence litigation he impliedly acquiesces and encourages the defendant to go on and probably lay out money in his illegal venture. And this doctrine seemed often to rest on the assumption, that unless the injured party immediately resort to the court, which step he may sometimes have no means of adopting, the court will not assist him at all. It might be doubted whether, when one person injures another's right, he ought not to take all the risks of losing money which he invests in such an undertaking; but there should be no obligation on a plaintiff, and nothing like a condition precedent, compelling him to be more than usually prompt. In strictness, an aversion to litigation should be encouraged rather than punished, and the indulgence shown by courts in favour of any one who has recklessly invested his money in injuring his neighbour seems somewhat unintelligible. If an injured owner of copyright gives early notice of his own rights and his claims, this ought to be sufficient to protect him, and entitle him to all the remedies which a court can give him; and in modern times this maxim of extreme haste is not allowed to intercept the plaintiff's claim to protection.¹ The doctrine is usually acted on where there is some doubt as to the legal copyright being in the plaintiff, in which case the court will not readily lend the aid of an injunction, as the ultimate success of the defendant must always be kept in view as a possible contingency. There are also some cases where the plaintiff has by his conduct misled the defendant into thinking, that an implied permission was given to publish the book; in which cases it is unjust to allow an injunction, because the plaintiff brought the difficulty on himself, and there is always the right of an action for damages in reserve.² And sometimes the subject-matter of the piracy is so trifling in value and importance that the court will not interfere at all.³ Or the nature of the case is such, that an injunction would practically do no good.⁴ And it often happens that what is wanted is to prevent only part of a work from being published, because that only is piratical; and in such a case the

¹ *Weldon v Dicks*, 10 Ch. D. 247; *Hogg v Scott*, L. R., 18 Eq. 444.

² *Baily v Taylor*, 1 R. & Myl. 76; *Tinsley v Lacy*, 1 H. & M. 750.

³ *Seeley v Fisher*, 11 Sim. 581. ⁴ *Cox v Land*, L. R., 9 Eq. 324.

court will prohibit the publication of such part at all hazards, whether or not thereby it involves the rest of the work, seeing that the defendant has brought the difficulty on himself.¹

A usual part of the remedy of injunction is an order that the defendant shall keep an account of the copies sold in the event of the plaintiff being found entitled ultimately to that benefit.²

Copyright in periodicals and contributions thereto.

—Owing to the circumstances peculiar to the preparation of periodical works, the statute declares, that when the proprietor of an encyclopædia, review, periodical magazine, serial work, or any book whatsoever, employs an author to compose articles on the terms that the copyright therein shall belong to such proprietor, then such proprietor has the same rights of copyright as to the whole and every part of the periodical as if he were the actual author thereof; subject to this qualification, that the copyright in the essays or articles furnished by a contributor shall, after twenty-eight years, revert to the contributor or author for the remainder of the term, and during those twenty-eight years the publisher shall not publish the essays or articles separately without consent of the author or his assigns.³ This lays down the general rule as to contributions to periodicals, and it lies on the author specially to reserve the right to publish the contribution in a separate form if he means to retain it.⁴ The terms of the agreement may be verbal or implied.⁵ But the copyright will remain in the author, unless he has consented in some form to part with it. And before the copyright in the article vests in the publisher, he must have paid the contributor, and not merely have contracted to pay him.⁶ And the publisher cannot publish the article except in the one periodical contemplated form; for if he republish it separately, or even in a supplement, he will violate his contract.⁷ The proprietor of the serial, in order to protect his copyright, must register the work at Stationers' Hall, and if the publisher

¹ Jarrold v Houlston, 3 K. & J. 708. ² Bailey v Taylor, 1 Russ. & M. 75. ³ 5 & 6 Vic. c. 45. § 18. ⁴ Ibid. § 18. ⁵ Sweet v Benning, 16 C. B., 459. ⁶ Brown v Cooke, 16 L. J., Ch. 140; Richardson v Gilbert, 1 Sim., N. S., 336. ⁷ Smith v Johnson, 4 Giff. 632; Planche v Colburn, 8 Bing. 15.

is not the proprietor, both names and places of abode must be stated.¹ The proprietor, after registration, has the usual protection against the author publishing separately. But as regards the right of the author to refuse consent to separate publication, that requires no registration.²

Peculiarities in contracts with authors.—The agreement between author and publisher is subject to the ordinary law applicable to agreements between parties; yet one or two difficulties arise out of the subject-matter, and so may be deemed peculiar to that contract. These agreements, being often vague, one difficulty is to ascertain whether the author has assigned the copyright, or merely granted a licence to publish one or more editions. In case of doubt, the court will lean against the construction, that any copyright was intended to be assigned by the author, and treat it as a mere personal agreement or joint adventure, or a licence coupled with a joint adventure.³ When there is no assignment of copyright, but the agreement is personal, neither party can, without consent of the other, assign his interest therein to a third party.⁴ Thus one firm of publishers cannot assign their interest in such contract to another firm.⁵ In the event of an agreement in the nature of a joint adventure for an indefinite period, the author can determine the joint undertaking, subject to the other party being recouped actual expenses.⁶ The stereotyping of a book does not deprive the author of determining the joint adventure, but it may render it more difficult to define what is an edition; and each separate quantity or batch may then be appropriately treated as a separate edition.⁷ If the contract is to assign the copyright for a term of years, as, for example, four years, without defining the number of copies to be printed, the author cannot prevent the publisher selling off after the expiration of the term what he had printed during the term; and in the absence of fraud the author cannot in any way check or control the publisher continuing the sale of such copies.⁸

¹ 5 & 6 Vic. c. 45, § 19.

² *Mayhew v Maxwell*, 1 J. & H. 315.

³ *Stevens v Benning*, 6 De G., M. & G. 223; *Reade v Bentley*, 4 K. & J. 664.

⁴ *Stevens v Benning*, 6 De G., M. & G. 223.

⁵ *Hole v Bradbury*, 12 Ch. D. 894. ⁶ *Reade v Bentley*, 4 K. & J. 656.

⁷ *Ibid.*

⁸ *Howitt v Hall*, 6 L. T., N. S. 348.

In these contracts an injunction against publication is seldom available. Thus, if a publisher agreed to pay a sum for a manuscript before publication, the author cannot obtain an injunction against publication till the price has been paid, for this price can be recovered by an action for the price.¹ The remedy of the publisher against an author resolves itself into an action for damages for breach of contract, seeing that an author cannot be ordered specifically to perform any contract which requires him to exercise his thoughts and commit them to paper.² The contract of an author to supply articles to a serial work is divisible, and if before completion of the contract the serial work cease, the publisher cannot claim the right to publish the articles separately, but is bound to pay a reasonable price for the part actually completed.³ In like manner a publisher who has a copyright in a book is liable in damages to the author, if he publish a new edition in the author's name, but so incorrect as to be injurious to the author's reputation.⁴ Yet no such liability will be incurred if the author had, from the tenor of his contract, placed himself in a subordinate position to the publisher, and allowed the latter to publish it in his own name and therefore to alter it at discretion.⁵ After the author has sold his copyright, the purchaser is entitled to make changes in it, but he is bound to inform the public, that the alterations are not made by the author.⁶ And on the other hand, the author cannot himself publish another book on the same plan and subject, for this would be to derogate from the former grant.⁷ And an artist who has sold a painting or photograph is expressly prohibited from reproducing a work on the same subject.⁸ But while damages may be recovered for injury caused to the reputation of an author, the court will not grant an injunction to stop the sale of such work on that ground alone, unless connected with property.⁹

Copyright in dramas.—It has already been pointed out, that the authorship of a drama and the valuable right

¹ Cox v Cox, 11 Hare, 118. ² Stevens v Benning, 6 De G., M. & G. 229. ³ Planche v Colburn, 5 C. & P. 53. ⁴ Archbold v Sweet, 1 M. & Rob. 162; 5 C. & P. 219. ⁵ Cox v Cox, 11 Hare, 118. ⁶ Archbold v Sweet, 1 M. & Rob. 162. ⁷ Rooney v Kelly, 14 Ir. L. R., N. S. 158; Colburn v Simms, 2 Hare 543. ⁸ 25 & 26 Vic. c. 68, § 6. ⁹ Clarke v Freeman, 11 Beav. 112.

arising from turning it to advantage was twofold, first to have the exclusive right of having it represented on the stage, and secondly the exclusive right of publishing the words in the same way as any ordinary book is published. A statute was passed in 1833, and amended in 1842, to confer on the authors of dramas or dramatic pieces this exclusive right of representing such pieces on the stage, that is to say, at any place of dramatic entertainment in the British dominions, in the same way as an author has copyright in the book itself, and for the same term.¹ And a dramatic piece was defined to include every scenic, musical or dramatic entertainment.² Though a pantomime can scarcely be reduced to writing or identified, yet the introduction being written is protected by the Act.³ And the right of representing a musical piece was put on the same footing as dramatic pieces, and the exclusive right of representation made identical in nature and duration with copyright.⁴ Where the dramatic or musical piece had not been published as a book before its representation, then the author or assignee is to register the time and place of the first representation or performance, which is deemed equivalent to publication, and the name and place of abode of the proprietor and the title of the piece.⁵ The copyright in a musical or dramatic piece is, *primâ facie*, first vested in the author; but, as in the case of books, the piece may, from its original composition, have been designed to be accessory to some other work, in which case the property may from the first be vested in another person.⁶ If the copyright has once vested in the author, then an assignment can only be acquired from the author by writing, even though the author was employed to compose a specific piece.⁷ The adaptation of opera music to the pianoforte is a distinct work from the opera itself, requiring skill and knowledge. And accordingly a composer of this pianoforte score is entitled to copyright in publishing it, and does not infringe the stage right in the original opera from which the pianoforte score was taken; ⁸ while it is equally clear that

¹ 3 & 4 Will. IV. c. 15; 5 & 6 Vic. c. 45, § 20.

c. 45, § 2.

³ Lee v Simpson, 3 C. B. 871.

² 5 & 6 Vic.

⁴ 5 & 6 Vic. c. 45, § 20.

⁵ Ibid.

⁶ Shepherd v Conquest, 17 C. B. 427.

⁷ Ibid.

⁸ Wood v Boosey, L. R., 2 Q. B. 340; L. R.

3 Q. B. 223.

his publication of such score would be an infringement of the copyright in the opera, if such opera had been published.¹

Assignment of right of representing dramas.—An assignment of copyright of a dramatic or musical piece is deemed to be confined to the ordinary publication of such piece as a book containing words only.² And it will not include the exclusive right of representation, unless an entry expressly stating that such right of representation is included is made at Stationers' Hall.³ The copyright in a dramatic or musical piece is in reality a double right, being first a copyright in the mere words or mere musical score, and also secondly, a stage-right, or right of representing on a stage the acting and the musical sounds represented by those words or notes. These two rights may be separated entirely, and assigned to different persons.⁴ And here a distinction is noticeable between the assignment of a book copyright and the assignment of the right of representing dramas or music. In the former case the right, as was observed, cannot be assigned for one locality without being assigned also for the rest of the British dominions; it must be assigned out and out and entire for the whole dominions or not at all.⁵ But as regards the right of representing plays and music, it may be assigned for one locality or town or theatre, and for no other; for though the publication of books cannot be confined to one spot or the operation limited in its effects without great uncertainty and confusion, there is no difficulty or uncertainty at all as regards the performance of a play or of music, for being a matter of the senses it is easily restricted to one spot.⁶ The assignment of a mere acting copyright in drama and music without the verbal right is on the same footing as the assignment of copyright in a book as regards suing for damages or penalties, and it seems registration is not a condition precedent to his action.⁷ And if both the copyright and the stage right be assigned together in one deed, then registration is not essential.⁸ And any words importing

¹ Ibid. ² 5 & 6 Vic. c. 45, § 2. ³ Ibid, § 22. ⁴ 5 & 6 Vic. c. 45, § 22; 3 & 4 Will. IV. c. 15, § 2. ⁵ See *ante*, p. 280. ⁶ See *Shepherd v Conquest*, 17 C. B. 427. ⁷ *Wood v Boosey*, L. R., 2 Q. B. 340.

⁸ *Lacy v Rhys*, 4 B. & S. 873; *Marsh v Conquest*, 17 C. B., N. S. 418.

assignment, if in writing, will be as effectual as the most express words, if the meaning be reasonably clear; thus where the author by letter agrees "to let A have" his drama, this will be a good assignment.¹ And as in the case of copyright in books, the assignment, if in writing, may be validly made by an agent, though that agent is not authorized in writing.² Where there are several joint owners, one cannot grant a licence for representation of the play without all the other owners concurring.³

Infringement of right of representation of dramas.

—If during the subsistence of copyright and stage right in a musical or dramatic piece any person cause the piece to be represented at a place of dramatic entertainment, such person incurs a penalty which is not less than forty shillings, and may be equal to the benefit or advantage arising from the representation; and full costs may be recovered besides, if the action or suit be commenced within twelve calendar months next after the offence committed.⁴ The penalties accrue to the benefit of the owner of the copyright and right of representation.⁵ And the court will protect the right by injunction.⁶ Though, therefore, the damage done by infringement may be in the form of a penalty or fixed sum in respect of each representation, yet the recovery must be by action in the High Court of Justice.⁷ And this action applies equally to infringement of copyright in musical compositions.⁸ The action for infringement of stage right must be brought within twelve calendar months after the offence has been committed.⁹ The introduction to a pantomime has been held a musical and dramatic composition.¹⁰ It is a violation of the enactment to pirate the chief incidents of a dramatic piece;¹¹ or to appropriate the name and description of a song the words of which were old;¹² or to convert the airs of an opera into the form of quadrilles and waltzes;¹³ and yet to arrange an opera score for the pianoforte is no infringement, but

¹ *Lacy v Toole*, 15 L. T., N. S. 512. ² *Morton v Copeland*, 16 C. B. 517. ³ *Powell v Head*, 12 Ch. D. 686. ⁴ 3 & 4 Will. IV. c. 15, § 2. ⁵ 5 & 6 Vic. c. 45, § 21. ⁶ *Chappell v Sheard*, 2 K. & J. 117. ⁷ 3 & 4 Will. IV. c. 15, § 2. ⁸ 5 & 6 Vic. c. 45, §§ 20, 21. ⁹ 3 & 4 Will. IV. c. 15, § 3. ¹⁰ *Lee v Simpson*, 3 C. B. 882. ¹¹ *Reade v Conquest*, 11 C. B., N. S. 479. ¹² *Chappell v Sheard*, 2 K. & J. 117. ¹³ *D'Almaine v Boosey*, 1 Y. & C. 288.

will be itself the subject of copyright, as it is a distinct performance.¹

Censorship of plays still retained.—It is not enough for an author to compose a drama; for the ancient practice of the censorship has been preserved, which prevents his turning such drama into practical use by actual representation, until the censor's approval has been obtained. As already noticed, all trace of censorship as to books was wholly obliterated in 1694, when the Licensing Act finally expired; but the old spirit soon revived, and it was thought by the wisdom of Parliament unsafe to leave authors and actors to their own devices, it being apparently assumed that the usual remedy of an indictment or criminal information was not adequate to deter offenders in this class of publications, though long since confessed to be so as to all others. Before the reign of Henry VIII. the direction of the king's hunting parties and musical recreations was vested in the Lord Chamberlain; and what had hitherto been a temporary office was made permanent by letters patent, and called the office of Master of the Revels. And Queen Elizabeth, when granting to the Earl of Leicester the first general licence for his theatrical servants to act stage-plays in any part of England, made it a condition, that the plays be first examined and allowed by the Master of the Revels. The troubles of the Commonwealth broke up the continuity of this official superintendence, but it was revived after the Revolution, and King William, impressed by the licentiousness of the stage—especially the incorrigible tendency to indulge in profane oaths—ordered, that the keepers of playhouses should not thereafter presume to act any play contrary to religion and good manners; and the Master of the Revels was not to license such a play. The control being imperfect, an Act of Anne still treated unlicensed players as previous statutes had long before treated them, namely, as rogues and vagabonds.² But under that act an unlicensed actor at the Haymarket Theatre being arrested on the stage, under a justice's warrant, as a vagrant, and lodged in Bridewell, and having

¹ Wood v Boosey, L. R., 3 Q. B. 223. ² 13 Anne, c. 23. In 1776 a fund for decayed actors was established, and the managers were incorporated with perpetual succession and a common seal. — 16 Geo. III., c. xiii.

succeeded afterwards, amid great applause of the populace, in procuring his discharge owing to his being a house-keeper, the necessity of a new law was made conspicuous. Though there were then only six theatres in London, in 1737 the mischief to youthful virtue was thought to call for some restrictions. And the Act of 10 George II., c. 28, was brought in and carried, notwithstanding long debates, and particularly Lord Chesterfield's masterly and animated opposition, grounded on its being an encroachment on the liberty of the press, uncalled for, and therefore unjust.¹ That act repeated, that actors in unlicensed houses, if they had no legal settlement there, were to be treated as rogues and vagabonds. Its main enactment was, that no play was to be acted, till it was allowed by the Lord Chamberlain. And above all, no play was to be acted for hire in any part of Great Britain except Westminster and near the royal residences—an absolute prohibition which had to be repealed thirty years later, as each of the large towns and cities successively by local act obtained the right of establishing its own local theatre. And though this act was said to be passed in a ferment at the suggestion of Sir R. Walpole, who had been smarting from some severe allusions on the stage,² and though frivolous objections had often been insisted on by the censor in course of his criticisms, the act remained in force till 1842, when the enactments were revised and continued in substance.³ Under the act of

¹ LORD CHESTERFIELD's main argument in opposing the bill was that the law already sufficiently punished blasphemy, and indecency, and libel; therefore, why add a new fetter upon the legs of liberty? He added, "Licentiousness is a speck on the eye, upon the political body, which I can never touch but with a gentle, with a trembling, hand, lest I destroy the body, lest I injure the eye, upon which it is apt to appear. There is such a connection between licentiousness and liberty, that it is not easy to correct the one without dangerously wounding the other. It is extremely hard to distinguish the true limit between them; like a changeable silk, we can easily see there are two different colours, but we cannot easily discover where the one ends or where the other begins. In public as well as private life, the only way to prevent being ridiculed or censured is to avoid all ridiculous or wicked measures, and to pursue such only as are virtuous and worthy."—10 *Parl. Hist.* 331. LORD KENYON said Dr. Johnson composed the above speech.

² Coxe's Walpole; 1 Colley Cibber's Life, 257.
c. 68; 24 *Parl. Deb.* (2) 1088.

³ 5 & 6 Vic.

1736 no alteration was allowed in the play as settled, and a clown dare not add the words "roast beef" to a jest. Sir R. Walpole, indeed, with his usual prudence, did not entitle his bill one to prohibit plays not licensed, but a bill to amend the Vagrant Act; and it was carried through the House of Commons in eleven days, and the House of Lords in seven days. By the Act of 1843 every person who shall cause to be acted, or for hire shall act, any new stage-play, or any act, scene, or part of one, until the same shall have been allowed by the Lord Chamberlain, or after it has been disallowed, shall forfeit a sum of 50*l.*, and the licence for such theatre shall become absolutely void.¹ A stage-play includes nearly every kind of entertainment of the stage, including opera and pantomime.² And though mere tumbling is not an operatic performance,³ yet where there is little else than dancing and pantomime it will be a question of fact, whether it amounts to this description.⁴ And a dialogue between two persons in costumes and characters satisfies the description of entertainment of the stage.⁵ But the Lord Chamberlain's allowance was carefully stated to be unnecessary for such theatrical representations as are given in booths or shows, allowed by justices at fairs and feasts.⁶

Regulations as to places where plays are performed.

—While the author's right in plays is part of the law of copyright, there are also special laws as to the place where plays are performed which brings them within that division of the law connected with freedom of speech and the practice of censorship already mentioned, for in all ages the licence of satire and comment indulged in by dramatists has attracted the notice of governments. The theatre has always been one of the places where the public have been accustomed to be indulged with hearing, and having an opportunity of sharing in, free opinions about their rulers and all the events of the period. Cicero said the ancient Greeks allowed the comedians to censure any action and any person by name. And though they did well in wounding some popular and bad characters, still it was better that the censor should do this work rather than poets. And

¹ 6 and 7 Vic. c. 68, § 15.

² Ibid. § 23.

³ R. v Handy,

6 T. R. 286.

⁴ Wigan v Strange, L. R., 1 C. P. 175.

⁵ Day

v Simpson, 18 C. B., N. S. 680.

⁶ 6 & 7 Vic. c. 68, § 23.

certainly after Pericles had governed the State both in peace and war for many years with great reputation, Cicero thought it intolerable that such a man should be abused on the stage in a way, that would not have been tolerated at Rome against such characters as Publius and Cneus Scipio, or Cato.¹ There was also some discredit associated in most countries with the very profession of actors on the stage.² In this country similar fears and jealousies of actors prevailed. A statute of James I. imposed a fine of 10*l.* on every person who in a stage-play or pageant "jestingly or profanely spoke or used the holy name of God, Christ Jesus, or the Holy Ghost or Trinity, which are not to be spoken but with fear and reverence."³ Stage-plays were severely treated by the Long Parliament, and all players were ordered to be apprehended as rogues and vagabonds.⁴ And the statute of Anne, as already stated, kept up the same treatment.⁵

¹ August. de Civit. Dei, ex Cicero de Rep. 134.

² A senator of the Areopagus was expressly prohibited from writing a comedy.—*Plut. De glor. Ath.* 348. The Spartans forbade all plays, as detracting from the respect due to the laws.—*Plut. in Inst. Lac.* 239. The Massilians did the same.—*Val. Max.*, b. ii. c. vi., § 7. Among the Romans the policy of theatres was long doubted, and Scipio Nasica persuaded the Senate to pull one down as a nuisance, and sell the materials.—*Liv. in Epit.* b. xlviii. *Val. Max.*, b. ii., c. iv. The doctrine at least was so far against theatres, that it was thought, if people would be so foolish as to go to plays, they ought not to be provided with seats but be made to stand. Moreover, the profession of player was deemed truly contemptible and all but infamous by the Romans.—*Liv.* b. vii., c. ii. *Tacit. Ann.* b. i., c. lxxiii.; b. iv., c. xiv. The Romans, it is true, allowed the comic poets to make sport of the gods, but they drew the line when magistrates were abused.—*August. de Civit. Dei.* The civil law also treated players as infamous, and incapable of being witnesses.—*ff.*, b. iii., tit. ii., § 1; b. xlviii., tit. ii., § iv. Senators and youths were prohibited from marrying or abducting women connected with theatres.—*Cod.*, b. i., tit. iv., § 14; *Cod. Theod.*, b. xv., tit. vii., § 2; *Ammian. Marc.*, xiv. 6; and the children of such forbidden marriages were deemed incapable of inheriting.—*Cod.*, b. v., tit. 27, § i. In the time of Charlemagne, the same character belonged to players.—*Capit. Car.* b. 7. In ancient Scotland Macbeth ordered actors to betake themselves to honest labour, otherwise they were to be yoked to a plough or cart, and made to draw like beasts.—*Hect. Boet.* fol. 251.

³ 3 Jas. I. c. 21, repealed 1843.

⁴ 1647, Scobell's Acts.

⁵ BURKE said the old acts against unlicensed players partook of the savage temper of the times. And even in 1777, when a bill was

Licences to keep theatres.—When the old statutes were repealed and the laws revised in 1843, it was declared, that while authority to exhibit plays might continue under letters patent from the Crown, the lawful authority within the Parliamentary boundaries of London and Westminster, and the five metropolitan boroughs adjoining, to grant licences for theatres, was the Lord Chamberlain. Such licence is only granted to the actual and responsible manager; the name and place of abode of the manager must be printed on every playbill, and he must give recognisances for a sum, not exceeding 500*l.*, for due observance of rules and payment of penalties.¹ In places other than the metropolis, the justices of the county or borough hold special sessions for granting like licences.² The Lord Chamberlain and justices can make rules for the management, specifying the hours of closing; and if a riot arise out of a breach of the rules, two justices can order the house to be closed for such time as they think fit.³ Whoever keeps an unlicensed house or place of public resort for public stage performances incurs a penalty of 20*l.* per day.⁴ But a person who uses a place only for a few nights is not deemed one who “keeps the place;” and that word refers to habitual use by one having the permanent control.⁵ Yet he may be convicted of causing the play to be performed. And even a person, who for a time acts, or causes stage plays to be acted in unlicensed places, incurs a penalty of 10*l.* for every day.⁶ And in some booths and tents though a licence cannot be obtained, yet the actors may incur this penalty.⁷ There are special powers given to the police in the metropolitan district to enter unlicensed houses or rooms for theatrical entertainments, to

proposed which was to authorise the king’s licence to a theatre at Birmingham, it was opposed as demoralising, though Fox said it tended to civilise and polish the citizen; and the House of Commons rejected it by a majority in the proportion of three to one.—19 *Parl. Hist.* 201. Women were first seen on the English stage in 1661.—1 *Pepys’ Diary*, 177. It was formerly deemed indecent in them to attempt such an employment.—*Prynne’s Hist.*, 414. In Spain it is said that women acted in 1623.—2 *Simon D’Ewes Autobiog. Halliwell*, 447.

¹ 6 & 7 Vic. c. 68, § 7. ² *Ibid.* § 5. ³ *Ibid.* § 9. ⁴ *Ibid.* § 2.

⁵ *R. v Strugnell*, L. R., 1 Q. B. 93; 7 B. & S. 124. See *Russell v Smith*, 12 Q. B. 217. ⁶ 6 & 7 Vic. c. 68, § 11. ⁷ *Fredericks v Payne*, 32 L. J., M. C. 78; *Tarling v Fredericks*, 28 L. T., N. S. 814.

which people are admitted for payment, and to take persons found there without lawful excuse; and the keeper and actors are liable to penalties.¹ A portable theatre was deemed not subject to this act.² If the occupier of the theatre let his company and his scenery to another for a sum of money, he will be liable as one causing the piece to be performed.³ Nevertheless where a person hires a room to give the representation or performance without the author's consent and therefore unlawfully, the person who lets the room is not the party liable in the penalty unless he takes an active part in the representation.⁴ What amounts to a representation of a theatrical or operatic piece depends on the acts done by the performers, and if a jury assist in the decision it will be for the jury to say, if the acts proved amounted to it or not. Where they held, that singing two or three songs out of an opera was a representation of part of the opera, the court would not interfere with such a conclusion.⁵

Right of public to applaud and hiss plays.—It is sometimes thought, that, as theatres are intended for the resort and recreation of the public, there are peculiar privileges if not absolute rights on the part of the public; and that the proprietor of the theatre is much at their mercy and cannot refuse to admit any person who chooses to enter on paying the appropriate price. But this is founded on confusion of ideas. A theatre differs in no respect from a shop or a building where a public meeting is held, or where the public are invited for a particular purpose; and it has been seen how far the exclusion of the public can be carried by the proprietor for the time being of any such place of meeting.⁶ In all such cases any one of the public can be turned out with or without reason by the chairman or occupier of the building after request and refusal, provided no more force is used than just enough to get rid of the intruder. So it is in theatres. In one case a person after admission, finding there was no room in the pit for which he had duly paid, climbed up into the boxes claiming a right to remain there without paying

¹ 2 & 3 Vic. c. 47, § 46. ² *Fredericks v Howie*, 1 H. & C. 381.

³ *Marsh v Conquest*, 17 C. B., N. S. 418. ⁴ *Russell v Briant*, 8 C. B. 836; *Lyons v Knowles*, 3 B. & S. 556; 5 B. & S. 751.

⁵ *Planche v Braham*, 4 Bing. N. C. 17.

⁶ See *ante*, p. 27.

the price of the box, and on refusal to leave the house struck a servant of the theatre, for which he was taken into custody by a constable, and for which imprisonment an action was brought by him. The judge told defendant that when he could get no adequate seat, his only remedy was to leave the theatre and demand back the admission money, but he had no further right.¹ The proprietor can at all times request a person who has paid for admission to leave the building whether he has misconducted himself or not; and the person so requested has no alternative but to leave, and may bring an action for breach of contract and for repayment of his money, but has no other remedy. The imprudence of so excluding a peaceable person is obvious; but the law is bound to regard only the strict rights of the respective parties to the contract, and a guest cannot argue with the master of the building about remaining, when his presence is objected to.

Sometimes an obnoxious actor is hissed systematically and a conspiracy is formed between several persons to do so. This is actionable on the ground that the object being to obstruct another in the exercise of his vocation is in the eye of the law illegal, and is a cause of action against each of the conspirators severally; and they may all be indicted jointly, if the conspiracy can be established.² And it is no justification that the actor is a person of bad character and lives by threatening to publish libels on persons in order to extort money for suppressing such libels, and so is considered too disreputable to listen to.³ If many join in noisy proceedings, the offence may amount to a riot or to an unlawful assembly, according to the circumstances.⁴ It is true, that spectators, while sitting in a

¹ *Lewis v Arnold*, 4 C. & P. 354. ² *Gregory v D. Brunswick*, 6 M. & G. 205; *Clifford v Brandon*, 2 Camp. 358. ³ *Ibid.*

⁴ "I cannot tell upon what grounds many people conceive, they have a right at a theatre to make such prodigious noises as to prevent others from hearing what is going forward on the stage. Theatres are not absolute necessities of life, and any person may stay away who does not approve of the manner in which they are managed. If the prices of admission are unreasonable, the evil will cure itself. People will not go, and the proprietors will be ruined unless they lower their demands. But the proprietors of theatres have a right to manage their property in their own way, and to fix what prices of admission they think most for their own advantage. The audience have

theatre are not prevented by any law of good manners or any legal impediment from expressing their opinions either by hissing or applauding; for being allowed to enter, this criticism is impliedly permitted to all without exception and disturbs nobody. Nevertheless any one who goes to an excess in hissing or applauding, can at all times be removed after request; and in case of dispute the respective rights and wrongs must be adjusted on the fundamental basis, that the proprietor and occupier of the house is entire master of the possession, and can even without reason exclude any person, subject only to an action for breach of contract, if there was a contract.

Copyright in engravings.—Published engravings were found by the courts to be with difficulty protected according to the understood principles of law of the time. The case of Hogarth's works and the expense and vexation incident to the defence of his property against piratical imitations,¹ led to a protecting statute in 1735.² The act was passed to confer a copyright on the artist in Great Britain analogous to copyright in books;³ and the act was extended to Ireland in 1836.⁴ It was designed to protect those (as it described them) "who by their own genius, industry, pains, and expense had invented or designed, engraved, or etched, or worked in mezzotinto or chiaro-scuro sets of historical or other prints, or had engraved the pictures, drawings, or sculptures of others."⁵ An amending act passed in 1777, and included maps and charts, and plans, and the same protection has been added to lithographs and like products.⁶ And the owner's name and the date of engraving were to be put on each plate.⁷ The

certainly a right to express by applauses or hisses their sensations at the moment; and nobody has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment. And if people endeavour to effect an object by tumult and disorder, they are guilty of a riot."—*Mansfield, C. J., Clifford v Brandon*, 2 *Camp.* 370.

¹ Nichols' Biog. Anecd. Hogarth. ² 8 Geo. II. c. 13. ³ 6 & 7 Will. IV. c. 59. ⁴ 8 Geo. II. c. 13; 7 Geo. III. c. 38.

⁵ 17 Geo. III. c. 57. ⁶ 15 & 16 Vic. c. 12, § 14. ⁷ 8 Geo. II. c. 13.

statute of 1777 was general in its terms, and prohibited copying of prints in any manner whatever; and hence was held to include the copying by means of photographs.¹ And the size or minute accuracy of the copy, is altogether immaterial.² And to make the matter still more clear the protection of the Engravings' Acts has been extended so as to prohibit the multiplication of copies by lithography or any other mechanical process.³ But the engraving of a picture, drawing, or photograph has now become an infringement of the copyright in those originals.⁴ And a person borrowing photographs for a particular purpose could not use those photographs for a different purpose, such as engraving and publishing them.⁵ The act protected plates which were joined with letterpress as much as if they were published separately; and in some cases they may be deemed to be part of the letterpress, and subject to the copyright of such letterpress, thereby rendering the essentials as to date, &c., unnecessary.⁶ The owner of the copyright is entitled under these acts to maintain an action against persons, who piratically publish or sell copies, without having his consent signed by his own hand in presence of two witnesses.⁷ And from this enactment it was held, that an assignment must be in writing, and signed by the assignor in presence of two witnesses.⁸ And he may recover penalties and forfeited copies either by action in an ordinary court, or in a summary proceeding before two justices in England.⁹ Registration of the copyright under this class of acts was required, whether the engraving was part of a book or published separately.¹⁰ And the condition as to the name of owner and the exact date being on the plate has been construed to be essential in order to maintain an action for damages, or recover penalties against a person making pirated copies. And the

¹ *Gambart v Ball*, 14 C. B., N. S. 306; *Graves v Ashford*, L. R., 2 C. P. 421. ² *Moore v Clarke*, 9 M. & W. 692. ³ 15 Vic. c. 12, § 14. ⁴ 25 & 26 Vic. c. 68. ⁵ *Mayall v Higbey*, 1 H. & C. 148.

⁶ *Bogue v Houlston*, 5 De G. and Sm. 275. ⁷ 17 Geo. III., c. 57; 5 & 6 Vic. 99, § 2. ⁸ See analogous reasoning, *ante* p. 279, as to mode of assigning copyright of books.

⁹ 25 & 26 Vic. c. 68, § 8. By the first act, 8 Geo. II., c. 13, the proprietor was bound to damask or destroy the forfeited copies; now he can do what he pleases with these.

¹⁰ *Stannard v Lee*, L. R., 6 Ch. 348.

name of the firm is sufficient without the names of the partners.¹ It was not necessary that the person selling or printing, should do so with actual knowledge, that the subject was engraved piratically; for the statute bears this construction, and in that respect imitates the Excise statutes which make knowledge of the seller immaterial.² The term for which this copyright was granted was first four-teen and then twenty-eight years.³

Copyright in paintings.—Previous to the year 1862, the courts of law assumed and decided, that if a painting were copied against the consent of the artist or owner, there was no remedy; and indeed Abbott, C. J., went the length of saying, that it would destroy all competition in the art if anything like copyright were recognised in paintings.⁴ The legislature swept away these misconceptions by enacting, that there shall be such copyright in the authors of original paintings, drawings, and photographs, and that the exclusive right of copying engravings or multiplying copies of such works not sold before 1862 should belong to the author and his assigns for the term of the natural life of such author and seven years after his death.⁵ But when a painting, drawing, or photograph is sold or executed for another for a valuable consideration, this copyright shall not belong to the artist unless he specially reserve it by a writing signed by the customer at or before the order. Nor shall the copyright or negative of photograph belong to the customer, unless, at or before the order, the artist by writing signed by him shall have given such copyright.⁶ If there is no copyright in any such work, then any person may copy or use it; and even if there is a copyright in the representation of a scene or object, another is not precluded from representing the same scene or object.⁷ This right of multiplying copies of paintings, drawings, or photographs is personal property, and the mode of assigning it is somewhat differently

¹ *Rock v Lazarus*, L. R., 15 Eq. 104. The word *del.* after the name sufficiently complies with the statute as indicating the name of the proprietor, and the publisher's name is unnecessary.—*Graves v Ashford*, 4 R., 2 C. P. 421.

² 7 Geo. III., c. 57; *Gambart v Sumner*, 5 H. & N. 5. ³ 8 Geo. II., c. 13; 7 Geo. III., c. 38. ⁴ *De Berenger v Wheble*, 2 Stark. 548.

⁵ 25 & 26 Vic. c. 68. ⁶ *Ibid.*, § 1. ⁷ *Ibid.*, § 2.

described from that relating to books. It is assignable only in writing signed by the proprietor or his agent appointed for that purpose in writing.¹ And hence greater strictness is required in proof of this assignment than the assignment as to books.² And a licence to use or copy such works requires also to be in writing signed in the same way.³ Those who knowingly make copies or colourable imitations of these copyright paintings, or multiply or sell the same without the proprietor's consent, commit an offence and forfeit to the proprietor 10*l.*, besides forfeiture of all the pirated copies.⁴ The statute besides imposing a penalty for the piracy or sale of pirated copies of paintings, drawings, and photographs, singled out several specific modes of infringement, and also subjected the infringer to a forfeiture to the proprietor of 10*l.*, or double value, and forfeiture of all unsold copies. These modes were fraudulently signing or affixing any name or initials, or knowingly selling copies so marked, or fraudulently selling them as genuine works of the author.⁵ One condition, however, is annexed, namely, that the names or initials fraudulently made, are those of authors living, or dead within twenty years.⁶ The photograph or any other copy of a painting or drawing, made directly or indirectly, being an infringement of copyright, the sale of every copy in violation of the act is a separate offence, and a separate penalty is recoverable for each.⁷ To sign or affix fraudulently a mark indicating the painter's name is an offence of cheating at common law irrespective of any statute.⁸ And it is now a misdemeanour to fraudulently affix these artist's marks.⁹

The remedies given by the Act cannot be enforced until the name and place of abode of the owner and date of the assignment, if any, and names of parties are entered in the register at Stationers' Hall.¹⁰ And the first assignment need not be entered in the register.¹¹ A short detailed description of the work must also be included in the register sufficient to enable a person having the picture

¹ 25 & 26 Vic. c. 68, § 3.

² *Strahan v Graham*, 16 L. T., N. S.

87. ³ 25 & 26 Vic. c. 68, § 3.

⁴ *Ibid.* § 6.

⁵ *Ibid.* § 7.

⁶ *Ibid.*

⁷ *Exp. Beal*, L. R., 3 Q. B. 387.

⁸ *R. v Closs*,

27 L. J., M. C. 54.

⁹ 25 & 26 Vic. c. 88.

¹⁰ *Ibid.* §§ 4, 5.

¹¹ *Re Graves*, L. R., 4 Q. B. 772.

before him to identify or ear-mark it, and judge if it is registered.¹ And the register may be corrected at the instance of a person really aggrieved.² Those who violate the copyright incur penalties and forfeitures which may be enforced by action and suit, or in a summary way.³ The summary remedy which may be prosecuted before justices is an alternative remedy specially suited to cases, which are often of so small importance, that promptitude is the chief consideration. The justices have power to declare the penalty as well as the forfeiture.⁴ The penalty so incurred is not in the nature of a debt which may be discharged by a bankrupt's certificate, but in the nature of a criminal punishment.⁵ A concurrent remedy is also allowed of injunction, if it seem just to the court, that the further publication of copies be stopped.⁶ And in case of imported pirated copies, these may be seized by a Customs House officer and detained to abide the result of proceedings.⁷

Copyright in sculptures.—A species of copyright in original sculptures of men, animals, or combined subjects, was conferred in 1798, which gave the maker a sole right and property therein for fourteen years from the first publication, and if at the end of such term the maker was alive and had not parted with his right, then for fourteen years more, provided he had put his name and date thereon before publication.⁸ When the Act of 1814 assigned a definite term of copyright in sculpture, it also expressly enabled the owner of the copyright to sue for damages those who infringed it.⁹ When the sculpture has been registered under the Designs Act, and each copy marked "registered," then a penalty is also incurred of 5*l.* to 30*l.*, which the proprietor may recover from the defendant, and this sum may be recovered either by action of debt or by summary proceeding before justices of the peace.¹⁰ The right to copyright in sculpture must be assigned by deed signed by the proprietor in presence of

¹ Exp. Beal, L. R., 3 Q. B. 387. ² Re Graves, L. R., 4 Q. B. 724. ³ Ibid. §§ 8, 9. ⁴ 25 & 26 Vic. c. 68, § 8. ⁵ Exp.

Graves, L. R., 3 Ch. Ap. 642. ⁶ 25 & 26 Vic. c. 68, § 9; Mayall v Higbey, 1 H. & C. 148. ⁷ 25 & 26 Vic. c. 68, § 10. ⁸ 38 Geo. III., c. 71, repealed by 54 Geo. III., c. 56. ⁹ 54 Geo. III., c. 56, § 3.

¹⁰ 13 & 14 Vic. c. 104, § 7; 5 & 6 Vic. c. 100, § 8.

two witnesses,¹ though most other copyrights may be assigned by writing not under seal.

Copyright in designs for ornament and of utility.

—There are two kinds of copyright in designs, one where the designs are for ornament, and the other where the designs are for utility. But the utility must be combined in some way with the shape and configuration of the parts. The copyright in designs for ornaments is founded on statutes, which define such designs as including every design applicable to the ornamenting of any article of manufacture, or of any substance artificial or natural, or partly artificial and partly natural, and whether such design be so applicable for the pattern or for the shape or configuration or for the ornament thereof, or for any two or more of such purposes, and by whatever means such design may be so applicable.² The proprietor of the design may be either the author or the employer, if a good and valuable consideration shall have been given by such employer to the author.³ And while he is proprietor, he can obtain an injunction not only against the sale, but the manufacture of articles containing this design.⁴ These statutes contain a variety of detailed provisions as to the mode of transfer and registration, and the remedies for piracy. The period for which the copyright is conferred depends on the fabric or material to which the design is applied, and extends from nine months to five years from the date of registry, subject to extension of the period.⁵

Copyright has also been conferred on the author of designs of utility, so far as such designs are for the shape or configuration of an article of manufacture, for a period of three years.⁶

¹ 54 Geo. III. c. 56, § 4. ² 5 & 6 Vic. c. 100, § 3; 6 & 7 Vic. c. 65; 13 & 14 Vic. c. 104; 21 & 22 Vic. c. 70; 24 & 25 Vic. c. 73; 38 & 39 Vic. c. 93. ³ 5 & 6 Vic. c. 100, § 5; 6 & 7 Vic. c. 65; 13 & 14 Vic. c. 104, § 16; 24 & 25 Vic. c. 73; 38 & 39 Vic. c. 93. ⁴ *McCrae v Holdsworth*, 2 De G. & S. 496. ⁵ 5 & 6 Vic. c. 100, § 3; 13 & 14 Vic. c. 104, § 9. ⁶ 6 & 7 Vic. c. 65; 13 & 14 Vic. c. 104; 21 & 22 Vic. c. 70; 24 & 25 Vic. c. 73.

CHAPTER XII.

PATENT RIGHT AND TRADE MARK.

Patent right generally.—Patent right is the exclusive right to make and use for sale articles of a material form made in a certain way, or use certain processes connected with such articles, and which the patentee by his own ingenuity invented. And though a patent has long assumed the form of a gift and a licence from the Crown, as if it conferred a privilege which he had no right to, it is obvious that as in the cognate case of copyright no man ever could at any stage of society be indebted to the sovereign, or to the legislature, for the faculties which have enabled him to mature his invention. And yet he cannot reap the natural reward and derive the reasonable profit of his own ingenuity without undergoing the forms of accepting a gift of what is peculiarly his own, and submitting to conditions accompanying that gift imposed on him by strangers, who in no degree helped him in any part of his discovery. In this last particular he is in a worse case than authors of books asserting their copyright. The ancients in all that regards this chapter of the law had not arrived at that stage of civilization, which brings out prominently the merits of inventions and which singles out such a vocation for protection in any shape. Their views at best were distorted by ignorance and superstition. All our knowledge and experience of this subject come from the last two or three centuries.¹

¹ A cook or confectioner was among the ancient Athenians entitled to a kind of patent right or monopoly for a year, when he invented an excellent dish.—*Athen.*, b. 12, c. 20. Tiberius, when an ingenious man one day brought him as a novelty a cup of flexible

Distinction between copyright and patent right.—

The holder of a patent has often been unjustly confounded with the grantee of a monopoly, but the distinction is apparent. A monopolist is he who has the exclusive right of buying and selling, or making a particular article which any other person might previously buy or sell or make:¹ whereas a patent springs from the secret thought of the inventor in precisely the same manner as a book springs from the secret thought of the author. Each can publish and communicate it or not, as he thinks fit. No power can compel him to do so. And up to a certain stage the inventor and the author stand in precisely the same position. But such was the confusion of thought that surrounded this and other subjects, that when the Statute of Monopolies was framed in 1624, declaring all monopolies thenceforth illegal, the legislature of that day deemed it prudent if not necessary to make an exception in favour of patentees for a period of twenty-one years. The Statute of Monopolies under the disguise of a gift to inventors really took away from them the main value of that gift and cut it down to a mere transient benefit of a few years duration. The legislature was however careful to confine the substance of this gift to "the true inventor of such manufactures which others did not then use," and even then there was a further prudent qualification, that the manufacture should not be mischievous to the State, which is a somewhat obscure qualification, yet is one which is common to all departments of law and every species of property and valuable interest.

Though the industry and ingenuity of man may affect all kinds of matter and extend to mental and intellectual subjects, yet the objects and scope of patents have always been contradistinguished from those of mere pictures and words and musical sounds. Patent right always contemplates some tangible and material adaptation or arrangement which can be handled, and weighed, and

glass, took care to cut off his head, as such an invention was certain to depreciate the precious metals.—*Plin. Hist. Nat.* 36, 66. The Emperor Charles V. acted more liberally, for he visited the grave of the man, who invented the art of curing herrings, and erected a magnificent tomb.—*Laing's Norway*, 370.

¹ Coke 3 Inst. 181

measured: so that though artistic and intellectual results are classed under the generic title of copyright, the analogous right in reference to material appliances is called by the name of patent right. The laws of matter are the field of research for the patentee, and cover a vast and illimitable range for the curiosity of man; and the results arrived at by thought and ingenuity in analysing and combining matter and force in endless varieties, and which enable mankind to acquire new comforts and enjoyments at a constantly decreasing expenditure of labour, give rise to this species of property. No limit can be assigned to the power of man thus to turn common materials into unforeseen uses and create fresh subjects of property. It has already been seen, that in early times the Crown assumed power to grant letters patent to printers, and granted privileges in the nature of exclusive rights relating to different subjects. It also assumed to grant privileges to individuals to trade in certain articles, and thereby prohibit others from interfering. And whether this right ever was legal or not, the legislature assumed it to be so; and having the power to declare anything legal it recognised this power as an exception to the abolition of all monopolies in the time of James I.¹

Though copyright and patentright agree in the fundamental basis, namely, that of protecting a man in his work and securing to him the natural fruit of that work, they differ in some essential points. In the case of books, no

¹ The 21 Jas. 1 c. 3, § 6, declared all monopolies to be void, "except patents and grants of privilege for the term of fourteen years or under, hereafter to be made of the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures which others at the time of making such letters patent and grants shall not use, so as also they be not contrary to law nor michievous to the State by raising prices of commodities at home, or hurt of trade, or generally inconvenient, the said fourteen years to be accounted from the date of the first letters patent or grant of such privilege."

It has been held, that the essential virtue of the patent is not ascribed to the statute, but is a gift from the Crown as part of its prerogative. And though monopolies were held to be illegal at common law as well as declared by statute so to be, yet there was a power reserved to the Crown to grant some monopolies, provided they could be shown to be productive of advantage to the community.—*Feather v R.* 6 B. & S. 285.

two authors could express their thoughts in the same order of words, which is the subject-matter of the property called copyright; and therefore the product of one is always ear-marked and distinguishable from that of another. And as all men may write books on one and the same subject, there can be no ground for interfering with each other's work, at least directly, and it is enough to prevent each from stealing from his neighbour's heap. With regard to patentable articles, it is found that the patent includes not only the product, but one particular way of making that product; and hence the ingenuity of workmen is more directly hampered by a patent than by copyright, for two finished articles may be identical in appearance and yet made by different processes. It is the difference in the process which, unless what is called a new combination is the characteristic, enables one patentee to prevent and so interfere with his neighbour's industry. In the making of books the product must always be different, and as to the process by which it is made, no court can inquire, for whether a book is the inspiration of a moment or the fruit of many years' labour, nothing can turn on this part of its merit so as to interfere with others trying to obtain the like inspiration and the like industry. Hence patents tend to interfere more with rival tradesmen making the same product by the same process; and it is difficult for inventors and for courts to know and lay down rules so as to indicate when the process is or is not infringed upon. Thus copyright applies to products more clearly identified, and does not interfere with any other rival processes for producing the same result. And hence, though the legislature may have dealt unjustly in confiscating the author's copyright which in no way interferes with other men's ingenuity and labour on precisely the same subject and by precisely the same means, yet it is less unjust towards patentees in confiscating their rights, on this very account of the clashing with rival workmen equally ingenious, and equally desirous of obtaining profit by such ingenuity.

Confusion in early ideas of patent right.—Such was the obscurity and confusion of ideas regarding the object, the origin, and meaning of patents, that judges at one time took credit to themselves for being no favourers of

patents, trying with all their astuteness to discover defects and defeat inventors, under the singular notion, that they were thereby extirpating some heresy or removing some common enemy of human progress, and putting down the dragons that guard wealth and progress.¹ A little reflection bestowed on the subject, however, soon teaches all men that a patent is only the fragment of a larger right which the legislature has taken from the rightful owner with the intention of benefiting the mass of mankind, who, having no ingenuity of their own and no turn for thinking, are always on the watch to appropriate the fruits of their neighbours' conquests without the trouble of working for them.

Another misconception which haunted the minds of the older judges and legislatures was this, that patents are a species of contract between the inventors and the public by which they exchange benefits; the one gives a new idea and a new and easier mode of attaining a desired result, and the other gives the benefit of protection so as to secure some pecuniary benefit for a few years to him who has first conceived the new process. But this was a far-

¹ LORD KENYON, C. J., went the length of saying, that "he was not one of those who greatly favoured patents, for though in many instances the public was benefited by them, yet on striking the balance upon the subject he thought that great oppression was practised on inferior mechanics by those who were more opulent."—*Hornblower v Boulton*, 8 T. R. 98.

And PARKE, B., said in 1841, that half a century ago, or even less, "there seemed to have been very much a practice with both judges and juries to destroy the patent right even of beneficial patents, by exercising great astuteness in taking objections as to the title of the patent, but more particularly as to the specification; and many valuable patent rights had been destroyed in consequence of the objections so taken. But within the last ten years (before 1841) courts had been not so strict in taking objections, and had endeavoured to hold a fair hand between the patentee and the public."—*Neilson v Hartford*, 8 M. & W. 806.

And LORD TENTERDEN, C. J., in 1831, observed that "a great deal too much critical acumen had been applied to the construction of patents, as if the object was to defeat and not to sustain them."—*Hullet v Hague*, 2 B. & Ad. 377.

"Every patent should be expounded favourably to the patentee. But yet the obvious meaning of the language must not be violated unless it is quite clear, that the patentee intended something different from that which the expressions indicate."—*Pollock, C. B., Palmer v Wagstaff*, 9 Exch. 501.

fetched theory. The inventor, like the rest of mankind, only follows his own instincts, and the bent of his nature; and his relation to his fellow-citizens is no more the form of a contract than that by which each citizen can be said to contract with his fellow-citizens for the protection of his body and the use of his limbs. The invention and its fruits are peculiarly the property of the individual inventor, and its benefits are an inseparable part of the individual man. The grant of letters patent does not create any contract between the crown and the patentee by which the patentee gives up his invention in consideration of the monopoly, but it is simply an exercise of the royal prerogative;¹ at least according to the rule of construction of crown grants nothing is deemed to be given away by the crown which is not expressly so stated. The crown may for this reason use a patented invention without any assent of or remuneration to the patentee. The use therefore by the crown is no infringement; nevertheless this does not protect any contractors who supply the crown with another's patented invention.²

Definition of subject-matter of patent.—One of the prominent difficulties attending the development of the patent law was that of defining the subject-matter of a patent, so as to distinguish it from many novelties which are not patentable. There was nothing definite in the Statute of Monopolies, which merely alluded to "new manufactures" as being the description of things, as to which there may be a first and true inventor and which others did not at the time use. Hence the courts began of necessity to define and create distinctions and subdivisions, in order to turn into certainty the loose and indefinite notions supposed to be involved in these meagre words of description. They began to consider what the legislature must have meant by a new manufacture, and what was meant by others using the same manufacture.³

¹ Feather v R., 6 B. & S. 285. ² Feather v R., 6 B. & S. 257; Dixon v London Small Arms, L. R., 10 Q. B. 130.

³ "COKE discoursed largely, and sometimes not quite intelligibly, on monopolies, in his chapter on monopolies.—3 *Inst.*, 181. But he dealt very much in generals, and said little or nothing of patent rights as opposed to monopolies."—*Eyre, C. J., Boulton v Bull*, 2 *H. Bl.*, 492.

Patent implies something corporeal and material.—

One of the early distinctions made in giving precision to the patent law was to decide, that a patent could not include mere abstract ideas except these took a material and palpable concrete form. No merely philosophical or abstract principle, it was said, could answer to the word “manufacture”; something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or at least some new mode of employing practically his art and skill, is requisite to satisfy that word.¹ One cannot patent a mere rule in mechanics, or the rule or law of falling bodies, and yet these rules may be applied in a new way to attain results hitherto unattainable, or not so easily attainable. And the court in 1795 held, that the subject-matter of the patent must be a vendible commodity, otherwise it cannot be included under the description of manufacture. The term manufacture must preclude all nice refinements.² At one time it was said, that a new manufacture must mean something “made by the hand of man;”³ and that it also included the practice or the manner of making or producing a result.⁴ For a manufacture means both the machine when completed and the mode of constructing it.⁵ Hence if the specification of a patent do not point out the mode by which a patented process is to be performed so as to accomplish the object in view, it will be a statement of principle only, and the patent will be invalid.⁶

Hence it is well settled, that a patent includes the process of making an article as distinguished from the article when made.⁷ And whenever a result produced by a combination is either a new article, or a better article, or a cheaper article to the public, than that produced before by the old method, such combination is a new manufacture and capable of a patent.⁸ And yet the labour of thought or experiments, and the expenditure of money, are not the essential grounds of consideration, on which the question whether

¹ *R. v Wheeler*, 2 B. & Ald. 349.
463.

² *Boulton v Bull*, 2 H. Bl. 492.
³ *Hornblower v Boulton*, 8 T. R. 99.

⁴ *Boulton v Bull*, 2 H. Bl. 492.
⁵ *Parke, B. Morgan v Seaward*, 2 M. & W. 544;
L. Westbury, *Ralston v Smith*, 11 H. L. C. 223.

⁶ *Bovill v Keyworth*, 7 E. & B. 725; *Hills v London Gas Co.*, 5 H. & N. 312.

⁷ *Neilson v Harford*, 8 M. & W. 806.

⁸ *Crane v Price*, 4 M. & Gr. 580; 1 *Webst. P.C.*, 375; *Murray v Clayton*, L. R. 7 Ch. 577.

the invention is or is not the subject-matter of a patent ought to depend. For if the invention be new and useful to the public, it is not material whether it is the result of long experiments and profound research, or rather of some sudden and lucky thought, or mere accidental discovery.¹ And yet the invention of one set of means cannot be said to interfere with the invention of another any more than one can say originally, that there ought not to be patents granted for the invention of distinct means to an end. The discovery of a particular road to attain a particular end does not at all interfere with the discovery of another road to attain that end.² Hence also it is conceded, that a patent may be granted for an improvement of a machine which is already patented. In such a case the value of the second patent to the patentee necessarily turns on the question, whether the old patent can be bought up before it expires, or at least the new patent will come into force the moment the old patent shall expire.³ Although one man has obtained a patent for a given object, there are many modes still open for other men of ingenuity to obtain a patent for the same object. There may be many roads leading to the same place. If a man has by dint of his own genius and discovery after a patent has been obtained been able to give to the public without reference to the former one a new and superior mode of arriving at the same end, there can be no objection to his taking out a patent for that purpose.⁴ When the process refers to a machine which is altered, then further distinctions must be made in order to show that substantially the same thing was not in use before, and if the alteration is an improvement, whether it is a material improvement.⁵ This latter question is, however, one for a jury.⁶

Novelty as an element of patent.—Much of the uncertainty and litigation attending patents turns on the difficulty of ascertaining whether the thing sought to be patented has sufficient novelty, or shows any inventive skill, for the statute speaks of “new manufactures.” As to the history

¹ Ibid. ² *L. Westbury, L. C.*, *Curtis v Platt*, 11 L. T. N. S. 245.

³ *Crane v Price*, Webst. P. C., 333. ⁴ Per *Tindal, C. J.*, *Walton v Potter*, 1 Webst. P. C. 590; *Wallington v Dale*, 7 Exch. 888. ⁵ *Brunton v Hawkes*, 4 B. & Ald. 540. ⁶ *Losh v Hague*, Webst. P. C. 205.

of the invention the courts cannot inquire; for what is discovered by one mind in a slow and tentative way after years of experiment, may in another mind be the result of a sudden happy thought. In one case immense patience, time, and money may have been expended; in the other case scarcely a thought may have been given. Yet the law was not made to reward mankind, and hence nothing can turn on the merely meritorious history of the discovery.¹ But though the mere meritoriousness of the invention cannot be taken into account as a reason for granting a patent, the utility is often a key to the novelty. Some variations, though novel, end in nothing, lead to nothing, and are the mere offspring of foolishness; but if the variation makes a thing cheaper, this is a good test of utility and of vendibility, and may well be presumed to be the result of a new idea, though it is not necessarily conclusive.² This led Buller, J., to say, that if anything is material and new which is an improvement of the trade, then it will support a patent.³ Sometimes a patent is taken out for applying to a new subject some process already used in relation to another subject-matter. If one man invents a new mode of looking at the moon, somebody else cannot take out a patent for using the same mode to look at the sun, nor for any mere application of it to a different purpose. If a man were to take out a patent for a telescope to be used to make observations on land, no one could say he would take out another patent for that telescope to be used for making observations on the sea.⁴ Hence a patent, for example, is void for applying the same finishing process to yarns of wool which had formerly been used to yarns of cotton and linen,⁵ and so for making petticoat hoops of steel where a patent existed for making them of whalebone.⁶

¹ *Crane v Price*, Webst. P. C. 411; 4 M. & Gr. 580. One test of novelty has been stated thus—"when the product which is the result of the apparatus, for which an inventor claims letters patent, is effectively obtained by means of the new apparatus, whereas it had never before been effectively obtained by any of the separate portions of the apparatus, which have been combined into one valuable whole."—*Cannington v Nuttall*, L. R., 5 H. L. C., 216.

² *Crane v Price*, 4 M. & Gr. 580. ³ *R. v Arkwright*, Webst. P. C. 71. ⁴ *Pollock, C. B.*, *Bush v Fox*, Macror. P. C. 164; 5 H. L. C. 707. ⁵ *Brook v Aston*, 8 E. & B. 478; 23 L. J., Q. B. 175.

⁶ *Thompson v James*, 32 Beav. 570.

Utility as an ingredient of patent.—Utility is also an essential feature of a valid patent. This is said to be because a monopoly necessarily implies utility in the article as a consideration.¹ It is true that judges have sometimes observed that there is nothing in the statute necessarily requiring this characteristic.² And it may be doubted whether the question of utility is anything more than a compendious mode introduced in comparatively modern times of deciding whether the patent be used within the Statute of Monopolies. Yet a monopoly is described as “mischievous to the state, to the hurt of trade, or generally inconvenient,” and hence any exceptions to that statute, such as patented articles are, must have the contrary characteristic and be at least useful.³ But though utility is one ingredient of a patent, it is not every useful discovery that can be made the subject of a patent, for it must be shown that the discovery can be brought within a fair extension of the words “new manufacture.”⁴

Prior publication or user of patent.—One of the conditions of patent right described by the Statute of Monopolies is, that the manufacture must not have been in use before: and the question comes to be, what was the extent and limit of this use, and how far it must be a public use, and whether it meant the use only in England or anywhere else. With regard to the nature of the prior use the courts have laid down the rule, that this meant a public and notorious use in contradistinction to a private or clandestine use, or mere experiments which have not ended conclusively in settling the character of the invention as a thing that would answer.⁵ Though the words in the statute are “which others did not then use,” the officers of the Crown at an early period took on themselves to insert in the letters patent the words “public use,” and hence it came to be settled, that the kind of use intended by the statute was of this public and notorious kind. Hence if the inventor had merely used it in his own factory among

¹ *Ashurst, J., Turner v Winter*, 1 T. R. 605. ² *Parke, J., Lewis v Marling*, 10 B. & C. 28. ³ *Morgan v Seaward*, 2 M. & W. 562.

⁴ *L. Cranworth, Ralston v Smith*, 11 H. L. C. 233. ⁵ *Carpenter v Smith*, 1 Webst. P. C. 540; 9 M. & W. 300; *Stead v Williams*, 2 Webst. P. C. 126; *Jones v Pearce*, 1 Webst. P. C. 122.

his own workpeople, this was not a publication.¹ And yet on the other hand it is not necessary, in order to establish the prior public use, to show that the article had been manufactured for sale;² nor that it was ever used in practice, if the whole process was described in a book published or sold in England long before;³ nor that it was actually sold to any one person, if it was offered to be sold.⁴ And this construction of the statute was considerate towards inventors, for it is well known, that the same invention might occur to two or more persons about the same time; and if one does not think fit to turn it to the greatest advantage, there is no reason why another should be debarred from doing so. Where the evidence of prior publication depends on some previous specification for another patent, then if in the latter a barren general description only is found probably containing some suggested information or involving some speculative theory, it will not avoid, for want of novelty, a subsequent specification or invention which involves a practical truth productive of beneficial results, unless the antecedent publication involved the same amount of practical and useful information.⁵ And for a like reason, when an invention once known has become a lost art and all living trace of its use and method has disappeared, there is no reason why this mere circumstance should disentitle a fresh inventor to turn his discovery to profit as a patent.⁶ The "use by others" referred to in the Statute of Monopolies has been construed to mean a use in the United Kingdom, for what may have taken place in foreign countries is not regarded. Hence it is, that a person may in England derive his knowledge of an invention entirely from a person living abroad, and yet the patent will be valid. There is nothing to prevent an alien friend, if the Crown think proper, from receiving such a grant either in his own name or in the name of another in trust for him.⁷ And though an article may be in common use in foreign countries but not known in England, who-

¹ *Betts v Menzies*, 1 E. & E. 990; 11 H. L. C. 654. ² *Betts v Neilson*, L. R., 3 Ch. 429. ³ *Ibid.*; *Househill Co. v Neilson*, 1 Webst. P. C. 718; *Stead v Williams*, 8 Scott, N. R., 472; *Lang v Gisborne*, 31 Beav. 135. ⁴ *Oxley v Holden*, 8 C. B., N. S. 666. ⁵ *Betts v Menzies*, 10 H. L. C. 117. ⁶ See *Househill Co. v Neilson*, 1 Webst. P. C. 717. ⁷ *Beard v Egerton*, 3 C. B. 97.

ever chooses first to patent it here will be deemed, in the eye of the law, the first inventor, and rightfully entitled to all the profits, though he himself was neither the inventor nor the assignee of the inventor.¹

Defence that patentee is not first inventor.—In like manner, when the first invention is disputed by proof of prior publication by third parties, the test of this being a defence is, whether the prior publication contained a mere speculative account, or had been reduced to a practical shape, and productive of beneficial effects.² And, moreover, a mere experiment, though successful, will not be deemed equivalent to a publication of a practical invention.³ As the applicant for a patent must not only be the first and true inventor, but others must not have used it before that time, it has been laid down as a corollary, that he who uses machinery, and leaves it open to public inspection for months before applying for letters patent, has lost his right, even though no other person may have yet actually used it, for he is deemed to have dedicated it to the public.⁴ It has been said that if an inventor sell his machines, but keeping the secret to himself, and when it is likely to be discovered by another, take out a patent, this would be unjust, because it would practically give him a monopoly for a much longer period than fourteen years. And a single sale, as an article of commerce, to any one who chose to buy, has been deemed a commencement of such public user, so as to disqualify the inventor from getting a patent.⁵ Yet a mere experimental use for private purposes, under an injunction of secrecy, does not amount to a public user.⁶ And mere delay in taking out the patent if there has been no public use or sale of the thing does no harm to any one, and is no bar to the letters patent.⁷

Patent including several distinct things.—There is no rule that a patent must be confined to one thing at a time, for it is impossible to foresee how far a complex machine may be capable of being separated, and its limbs and

¹ Chappell v Purday, 14 M. & W. 318. ² Betts v Menzies, 10 H. L. C. 117. ³ Re Newall, 4 C. B., N. S. 269. ⁴ Re Adamson's Patent, 6 De G. M. & G. 420. ⁵ Morgan v Seaward, 1 Webst. P. C. 189; 2 M. & W. 559. ⁶ Morgan v Seaward, 1 Webst. P. C. 189. ⁷ Bentley v Fleming, 1 C. & K. 587.

members of acquiring a distinct and independent value. It is enough that the combination of several things, each in itself common and well known, has achieved a new result both useful and vendible. In such cases it is said that it is the combination that is the patentable subject.¹

Patent for a joint invention.—There may be questions as to the share of two or more in the originality of an invention, so as to render it difficult to prove, that the patentee was the sole or true inventor. Sometimes an employer uses a workman's ingenuity, and takes an undue advantage of it in appropriating the merit to himself, and securing the fruits; and sometimes this auxiliary work is overestimated. This point is often made matter of defence to show, that others did at the time use the thing which was alleged to be invented, and so that the title of the patentee is defective.² In such cases the crown uses its discretion as to the proper person to whom the letters patent should be given.³ He who really invents may lack the mechanical skill to achieve complete success, or he may afterwards improve his invention by the aid of such skill; and yet notwithstanding this help, he may be the sole true inventor. Much discrimination in the relative situation and the relative importance of the work done is required in order to estimate the true bearing of this kind of assistance.⁴

Patent for a principle or process.—It is sometimes said there can be no patent taken out for a mere principle. Nevertheless, if that principle is new in its application, and is embodied in a concrete example, and so connected with corporeal substances as to produce practical effects in any art or trade, and so as to be individualised and earmarked, there is no harm in calling it a patented principle. It is the practical example, however, that constitutes the real essence of the thing patented.⁵ Such was the instance of using heated air as a blast for furnaces.⁶ And using a combination of an exhaust and a blast in cleaning

¹ *Cannington v Nuttall*, L. R., 5 H. L. C. 205. ² *Exp. Scott*, L. R., 6 Ch. 274. ³ *Re Harrison*, L. R., 9 Ch. 631. ⁴ *Allen v Rawson*, 1 C. B. 551.

⁵ *Boulton v Bull*, 2 H. Bl. 463; *Hornblower v Boulton*, 8 T. R. 95; *Hall v Jervis*, 1 Webst. P. C. 97.

⁶ *Neilson v Harford*, 1 Webst. P. C. 273; *Jupe v Pratt*, *Ibid.* 146.

millstones at work.¹ And in like manner, if a new process is discovered, which dispenses with some intermediate stage or process, it becomes patentable, as where gas, having been formerly made from oil, and the oil from seeds, a person invented a process for getting the gas from the seeds without the intermediate process of pressing out the oil.² It is enough in such a case to describe the principle and the specific process by which the principle is carried out.³ For if the principle is alone asserted, and no specific process of acting on it is defined, the patent will usually be void for uncertainty.⁴

Requirements of the specification of patent.—The specification describing a patent is intended to describe the mode of constructing, using, or compounding the invention mentioned in the patent. The patent cannot be construed by the light of the specification, yet may be altogether invalidated by defects in the specification. In case of dispute, it must be left as a question to a jury whether a patent covers too much, or is competent, and is generally sufficient, to inform a workman of average skill in that line of business to act upon it.⁵ Yet the construction of the specification is a question of law for the court or the judge, it being left only to the jury to ascertain the meaning of the words and surrounding circumstances.⁶ And the court will read the specification as a person of ordinary understanding would do, not loosely conjecturing anything, but at the same time not scanning it, as if it were a special plea.⁷ The function of the specification is so to describe the invention, that competent workmen familiar with the science or industry to which the subject belongs, may be enabled to construct or reproduce the article patented. It is addressed to persons in the profession, not to men of ignorance; and if it is understood by those whose business leads them to be conversant in such subjects, it is intelligible.⁸ For Lord Ellenborough said, that no sort of specification would

¹ *Bovill v Keyworth*, 7 E. & B. 724. ² *Booth v Kennard*, 1 H. & N. 527. ³ *Ibid.* 2 H. & N. 84. ⁴ *Seed v Higgins*, 8 E. & B. 773; 8 H. L. C. 550. ⁵ *Hill v Thompson*, 3 Mer. 626; *Parkes v Stevens*, L. R., 5 Ch. 36. ⁶ *Neilson v Harford*, 1 Webst. P. C. 370. ⁷ *Rolfe, B., Sellers v Dickenson*, 5 Exch. 326. ⁸ *Arkwright v Nightingale*, 1 Webst. P. C. 60; *Bovill v Pimm*, 11 Exch. 740; *Walton v Potter*, Webst. P. C. 585.

probably enable a ploughman utterly ignorant of the whole art to make a watch.¹ But this is only another mode of describing the general rule, that the object is to attain precision and identification of the particular article, so that the public may know it is ear-marked, and how much and how little is new.² Or, as has been said, one object of a specification is to define the matter, so that the public may know with certainty what they may or may not do without incurring the risk of an action for an infringement.³ The generality of the patent may be made precise by the specification; but there must be no inconsistency or repugnance between them.⁴ The patent must not represent the party to be the inventor of the thing, and the specification show him to be the inventor of another thing; because perhaps if he had represented himself as the inventor of that other it might have been well known, that the thing was of no use, or was in common use, and he might not have obtained a grant as the inventor of it.⁵ And the specification will be construed, if possible, so as to be co-extensive with the new discovery.⁶ Thus, when the patent was for improvements in instruments used for writing and marking, and the specification described pens and pencils, this was held consistent.⁷ And the same consistency must exist between a provisional specification and a complete specification.⁸

Another maxim is, that the patentee must distinctly state, what is new and what is old.⁹ The patent must not be ambiguous, for if so it is void, being deemed a deceit practised on the crown.¹⁰ It must not be vague. Thus to state the ingredients used in making a pill without stating the proportions is a fatal uncertainty.¹¹ And yet vagueness is not to be construed literally, unless it appears that the patent was purposely so expressed as to comprehend inventions not yet discovered.¹²

¹ *Harmar v Payne*, Dav. P. C. 318. ² *Neilson v Harford, Webst.* P. C. 331; *Kay v Marshall*, 1 M. & Cr. 373; 2 *Webst.* P. C. 39.

³ *Gibson v Brand*, 4 Scott, N. R. 890. ⁴ *Cook v Pearce*, 8 Q. B. 1044. ⁵ *R. v Wheeler*, 2 B. & Ald. 345. ⁶ *Haworth v Hardcastle*, 1 *Webst.* P. C. 480.

⁷ *R. v Mill*, 10 C. B. 379. ⁸ *Penn v Bibby*, L. R., 2 Ch. 132. ⁹ *Holmes v L. & N. W. R. Co.*, 12 C. B. 831. ¹⁰ *Campion v Benyon*, 3 B. & B. 5; *Brunton v Hawkes*, 4 B. & Ald. 541. ¹¹ *Liardet v Johnson, Webst.* P. C. 54.

¹² *Cook v Pearce*, 8 Q. B. 1064.

A mere nicety of grammar will not indeed be regarded, if a competent workman would not be misled by it; for a specification is not intended to compel a person to learn who is determined to misunderstand, but to direct one who is willing to understand.¹ And when it is said, that an error in a specification, which any workman of ordinary skill and experience would perceive and correct, will not vitiate a patent, it must be understood of errors which appear upon the face of the specification or the drawings it refers to, or which would be at once discovered and corrected in following out the instructions given for any process or manufacture; and the reason is, because such errors cannot possibly mislead.²

There must also be good faith held by the patentee. It is the duty of a patentee to point out in his specification the plainest and most easy way of producing that for which he claims a monopoly, and to make the public acquainted with the mode which he himself adopted. If a person, on reading the specification, would be led to suppose a laborious process necessary to the production, the public are misled.³ For in a specification there must be the utmost good faith. Thus, to tell the public that "the finest and purest chemical white lead" was necessary, and it turned out, the best white lead that could be obtained in the shops in London would not do, but that a purer white lead, prepared only on the continent, would be required, then this last circumstance ought to be stated.⁴

The specification, being often said to be the price, which the party who obtains the patent pays for it, it would be a bad bargain on the part of the public, if he were allowed to clothe his discovery and his description in characters so dark and so ambiguous, that no one could make the article from it, when the fourteen years expired; and if he should not have paid the price for which he enjoyed the exclusive privilege, but should have it in his own hands still for as long a period as he chooses. Therefore, it is always a proper answer, when a patent is set up, to say that "you have not so described it that it may be understood."⁵

¹ *Maule, J., Beard v Egerton*, 8 C. B. 165. ² *Westbury, L. C., Simpson v Holliday*, L. R., 1 H. L. 315. ³ *Savory v Price*, 1 Ry. & M. 3. ⁴ *Sturtz v De la Rue*, 5 Russ. 327. ⁵ *Tindal. C. J., Walton v Potter*, 1 Webst. P. C. 595; 3 M. & Gr. 411.

Registration of patents.—For the convenience of the public a register of patents is kept open to inspection, so as to inform all who are concerned who is the inventor, and if the patent has been assigned, who is the assignee.¹ And entries may be expunged, if fraudulently made.² When several persons jointly obtain letters patent, there is no implied contract, that no one of them shall use the invention without the consent of the others, or if he does that, that he shall use it for their joint benefit.³ And there is nothing now to prevent more than 12 persons having a legal and beneficial interest in a patent.⁴ In the case of joint owners, there is no necessary partnership in the working of the patent arising out of the mere authorship, for each may work it in his own right, and neither can compel the other to concur in granting licences to third parties to use it.⁵ Yet, if one joint owner were to sell patented articles at a nominal price, and so injure the other owner's right, an action for this depreciation may be competent. When the owner of a patent manufactures and sells the patent article in a foreign country, as well as in England, the sale in one country implies a licence to use it in the other. But if he has assigned his patent in either country, the article cannot be sold so as to defeat the rights of the assignee.⁶

Assignment of patent rights.—Though the inventor of a patentable invention has a certain capacity to take out the patent, yet before that step the species of interest in the subject-matter is not assignable because it does not exist. It is true he may covenant to take out the patent or to assign the patent when completed. When the patent is obtained and exists, it is treated much the same as a chattel, and on bankruptcy it passes to the creditor's trustee.⁷ And it is the same where the patent was taken out after an act of bankruptcy, and before the bankrupt has obtained his discharge.⁸ On the sale of a patent there is no implied warranty, that the invention was new or was

¹ 15 & 16 Vic. c. 83, §§ 34, 35. ² *Morey's Patent*, 25 Beav. 581; *Horsley's Patent*, L. R., 8 Eq. 475. ³ *Mathers v Green*, L. R., 1 Ch. 29. ⁴ 15 & 16 Vic. c. 83, § 36. ⁵ *Elgie v Webster*, 5 M. & W. 518; *Ridgway v Phillips*, 1 C. M. & R. 415. ⁶ *Betts Willmot*, L. R., 6 Ch. 239. ⁷ *Hesse v Stevenson*, 3 B. & P. 565.

⁸ *Ibid.*

a manufacture within the statute of James I., but merely that Her Majesty had granted the letters patent to the seller which he proposed to assign;¹ for the purchaser has the same means of ascertaining the validity of the patent as the vendor.

Distinction between assignment and licence to use.—The distinction between an assignment and a licence is difficult to maintain when no place is defined for the licence to operate; the two rights then practically coincide.² And whether a licence is to be construed as a personal privilege in the licensee, or is assignable, must depend on the words of the grant. There is no particular form for passing a licence, but licensing a person and his assigns is licensing him and all whom he may license. A licence is not really assignable, and it acts only as an estoppel between the parties. It is an excuse for an infringement.³ And a verbal agreement to pay a royalty on all machines supplied to D, for his own use or the use of others, was construed as a valid licence.⁴

Relation between patentee and his licensee.—When a licence has been granted for a rent, and the licensee discovers that the patent is invalid, it depends on the nature of the contract between them, whether the licensee is estopped from denying the title of the patentee; for if not he may set up the invalidity of title as an answer to an action for rent, or for the infringement, or for an injunction.⁵ Sometimes, after a licensee has paid a rent, he is not estopped from setting up the invalidity of the patent as an answer to the action, or to further demands if the consideration had wholly failed.⁶ If the licence is by deed, then if the licensee uses the patent, he cannot set up the defence that the invention is worthless, or of no possible utility, and was not new; and that the patentee was not the first inventor.⁷ And the relation between patentee and licensee in the matter of the latter being permitted to

¹ *Smith v Neale*, 2 C. B., N. S. 567. ² *Protheroe v May*, 1 Webst. P. C. 415; 5 M. & W. 675. ³ *Bower v Hodges*, 13 C. B. 765; 22 L. J., C. P. 198. ⁴ *Crossley v Dixon*, 10 H. L. C. 293.

⁵ *Bowman v Taylor*, 2 A. & E. 278; *Warwick v Hooper*, 3 Mac. & G. 60; *Jones v Lees*, 1 H. & N. 189. ⁶ *Chanter v Leese*, 5 M. & W. 698. ⁷ *Smith v Scott*, 6 C. B., N. S. 771; *Noton v Brooks*, 7 H. & N. 499.

deny the former's title has been held to be strictly analogous to the relation between landlord and tenant.¹

The doctrine, that a patentee may abandon his patent is recognised on the same principles as govern other property. If he stand by and allow third parties to use his property as if it were their own, and thereby mislead them into expense which he might have prevented at any moment, this is deemed a reason for a court not assisting him by an injunction.² And where a patentee granted a licence which was worked several years, and the licensee paid 425*l.* when the patent turned out to be not new, the court held that the licensee could not recover this money, because the licensee had the enjoyment of what he stipulated for. He was like the man who leases land and pays rent, and is then evicted, and who cannot recover back his rent while he had taken the fruits of the land.³

Infringement of patent — The main thing secured by a patent being the exclusive privilege of making the article for sale, it follows, that any making of the thing without such variation as amounts to a new discovery will be an infringement.⁴ Therefore if it is made for use and so as to be saleable, this is an infringement; nevertheless, if it was made for mere amusement, or as a model, this being no substantial use, the infringement is too trifling to be noticed.⁵ And where a patent was taken for converting iron into cast steel by using mixtures of cast iron with carburet of manganese, and another person discovered that coal tar and black oxide of manganese produced the same effect when mixed with cast iron pieces, this was deemed no infringement.⁶ When the thing patented consists in a design and the two things appear to ordinary observers the same, the selling of the thing will be an infringement when they are the same in substance though with immaterial variations.⁷ And the similarity of structure in two things fulfilling the same purpose is presumptive evidence of their being made in the same way.⁸

¹ Warwick *v* Hooper, 3 Mac. & G. 60; Crossley *v* Dixon, 10 H. L. C. 293. ² Saunders *v* Smith, 3 M. & Cr. 711. ³ Taylor *v*

Hare, 1 B. & P., N. R. 260. ⁴ Walton *v* Potter, 1 Webst. P. C. 585. ⁵ Jones *v* Pearce, 1 Webst. P. C. 125; Higgs *v* Goodwin, E. B. E. 529. ⁶ Unwin *v* Heath, 5 H. L. C. 505. ⁷ Walton *v*

Potter, 1 Webst. P. C. 586; Bovill *v* Moore, Dav. P. C. 361.

⁸ Huddart *v* Grimshaw, 1 Webst. P. C. 85.

The question whether one thing is a mechanical equivalent for another is a question of fact for the decision of a jury.¹ And the fact, that a new machine includes what is contained in the old, but contains an improvement besides, will not the less make it an infringement.² Where a patent is taken out for a combination of different parts without expressly claiming the parts taken separately, this will be deemed impliedly to include such of the several separate parts as are new and material to the process.³ And where a patent includes a combination of several things, one of which is material but not new, this will avoid the whole patent on the ground of its being a fraud on the Crown or a false suggestion.⁴ And it is an infringement to use or sell or offer the article for sale in this country, though it was made abroad, or where the patent did not extend.⁵ The using of a patented article by a purchaser, who cannot be supposed to know whether the person making it infringed a patent or not cannot be construed as an infringement, and yet the person selling it may infringe, for it is his business to know such a matter.⁶ Yet where a retail dealer unwittingly sells articles which are an infringement of the patent he cannot be sued by the patentee, if he give full information as to the persons from whom he obtained the articles complained of.⁷

Injunction against infringement of patent.—Whether and on what terms an injunction will be granted to prevent the infringement of a patent depends on the *prima facie* indisputability of the title, and the nature of the mischief likely to be caused to the patentee and the infringer respectively by a temporary toleration or stoppage of the sale. And the court will not assist a patentee in this way unless he apply very promptly after knowledge of the infringement.⁸ The rule is, that where a person has been long in the enjoyment of a right undisputed and undisturbed, he shall have the protection of an injunction against an

¹ Morgan v Seaward, 1 Webst. P. C. 170. ² Electric Co. v Brett, 10 C. B. 838; Hall v Jarvis, 1 Webst. P. C. 100. ³ Lister v Leather, 8 E. & B. 1004. ⁴ Morgan v Seaward, 2 M. & W. 544.
⁵ Neilson v Betts, L. R., 5 H. L. 1; Walton v Lavater, 8 C. B., N. S. 162; Oxley v Holden, Ibid. 666. ⁶ Gibson v Brand, 4 M. & Gr. 179, 196. ⁷ Betts v Willmot, L. R., 6 Ch. 239. ⁸ Smith v L. & S. W. Co., Kay 408; Bovill v Crate, L. R., 1 Eq. 388.

invader, until such invader shall establish his rights by action. He shall be held to have a right to have his enjoyment protected, any disturbance of which it would be so difficult to compensate. On the other hand, it is true, it would be nearly as difficult to compensate the defendant if he be unjustly restrained.¹ The court can grant an injunction before the hearing where the patent is an old one, and the patentee has been several years in undisturbed enjoyment of it, or where the conduct of the defendant is such as to enable the court to say, that, as against the defendant himself there is no reason to doubt the validity of the patent.² But the user must be of an active kind, and not merely nominal.³ And evidence of actual infringement must also be shown.⁴ Thus when an injunction is asked for to restrain the infringement of a patent, the court has reason to consider first the validity of the patent; secondly, the fact of the infringement; where those two facts are established, it is within the power as it is the duty of the court to grant the injunction.⁵ And where the infringement has not been proved, but only an extreme probability that it will take place, the court will equally grant the injunction.⁶ When the validity of the patent is clear and has been established, the court will order an account of all the profits made by the infringer; and if the patent has expired, the account will include all the unsold articles made while the patent was in force.⁷ Nevertheless, upon the decree against infringement the patentee is not entitled to have both an account and profits and an inquiry into damages. He must elect which of the two forms of relief he will adopt.⁸

Questions for jury on trial of patent actions.—In all cases the question of novelty of an invention must be mainly one of fact, and therefore usually to be tried by a jury. Nevertheless, it may be impliedly involved in a subsidiary point, such as prior publication in a book of large circulation, describing the mode of making or using

¹ *V. C. Wood, Betts v Menzies*, 3 Jur. N. S. 357. ² *Dudgeon v Thomson*, 30 L. T., N. S. 244. ³ *Plimpton v Malcolmson*, 44 L. J., Ch. 257. ⁴ *Betts v Willmott*, L. R., 6 Ch. 239; *Neilson v Betts*, L. R., 5 H. L. 1. ⁵ *Bridson v Macalpine*, 8 Beav. 230. ⁶ *Adair v Young*, 12 Ch. D. 13. ⁷ *Crossley v Beverley*, 1 R. & My. 166. ⁸ *De Vitre v Betts*, L. R., 6 H. L. 319.

the invention.¹ And where the question is as between two processes whether they are substantially the same, and hence that the later one was no invention at all, this also is a question for a jury.² But if the processes are described in two specifications, those being in writing, the construction is then a question of law for the court; or at least the court must first explain to the jury the respective constructions of the documents, and then ask the jury if they are the same thing.³ A court cannot itself compare two inventions so as to pronounce them identical, but must ask the jury to say if this is so.⁴ The question what is a proper subject for a patent is a question of law, though this may in turn depend on the prior ascertainment of certain isolated facts to be determined by the jury: as, for example, if it is only an instance of an old process applied to a new occasion, in which case it is not patentable;⁵ or if it is a more economical and cheaper mode of making a thing already in common use, in which case it is patentable.⁶

Extending, altering, and repealing patent.—A power is vested in the Judicial Committee of the Privy Council by-statute to extend the term of a patent by seven years on good cause shown, which usually means the inadequate profits of the patentee in proportion to the merit of the invention. For such applications are by no means granted as matters of course.⁷ And they are never granted except on a very clear and precise account of the extent of the remuneration hitherto obtained.⁸ And if the patent is assigned, sometimes it is made a condition, that an annuity shall be granted to the original inventor by the assignee during the extended term.⁹ As it sometimes happens, that a patent has been granted under circumstances which import fraud on the Crown, it may be repealed by *scire facias*; and the grounds on which the court gives judgment do not

¹ *Lang v Gisborne*, 31 Beav. 133; *Stead v Williams*, 2 Webst. P. C. 126. ² *Steiner v Heald*, 6 Exch. 607. ³ *Betts v Menzies*, 10 H. L. C. 117; *Hills v Evans*, 4 De G., F. & J. 288. ⁴ *Delarue v Dickenson*, 7 E. & B. 738. ⁵ *Losh v Hague*, 1 Webst. P. C. 202.

⁶ *Crane v Price*, 1 Webst. P. C. 408. ⁷ 7 & 8 Vic. c. 69, § 4; *Honiball's Patent*, 9 Moore, P. C. 393; *Pitman's Patent*, L. R., 4 Pr. C. 87. ⁸ *Saxby's Patent*, 9 Moore, P. C., N. S. 82.

⁹ *Russell v Ledsam*, 1 H. L. C. 687; *Russell's Patent*, L. R., 4 Pr. C. 87.

materially differ from many of the defences set up in actions by patentees against those who infringe the patent.

In some cases the patent may be amended after sealing, and also there may be a disclaimer and memorandum of alteration.

Object and origin of trade mark.—While copyright and patent right are founded on the same essential principle, namely, that he who creates or originates a valuable order of words, or a valuable corporeal article or process, should be insured in the use of these and in turning them to the best advantage, so the use of a trade mark is often adopted to single out some superior article which the manufacturer is confident cannot be surpassed in quality, though it may be imitated by inferior workmen or salesmen. In a trade mark there is less of the inventive faculty and less of intellectual labour than in copyright and patent right. Yet as many articles of commerce depend for their merit much on the manufacturer or producer, it is equally just that he should be protected in the benefits derivable from the public being able easily to identify and so secure whatever value attaches to such article when sold. The essence of a trade mark is thus to ear-mark one article from all other articles having this superficial resemblance. It thus very nearly resembles property.¹

¹ "This right cannot be properly described as a copyright; it is, in fact, a right which can be said to exist only, and can be tested only, by its violation. It is the right which any person designating his wares or commodities by a particular trade mark, as it is called, has to prevent others from selling wares which are not his, marked with that trade mark in order to mislead the public, and so incidentally to injure the person who is owner of the trade mark. Any one who has adopted a particular mode of designating his particular manufacture, has a right to say, not that other persons shall not sell exactly the same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to steal (so to call it) his trade mark, and make purchasers believe that it is the manufacture to which that trade mark was originally applied."—*L. Cranworth, L. C., Farina v Silverlock, 6 De G. M. & G., 217.* "When it is said, there is no property in a trade mark, this must be understood to mean that there can be no right to the exclusive ownership of any symbols or marks universally in the abstract; thus an iron-founder, who uses a particular mark for his manufactures in iron, could not restrain the use of the same mark when impressed on cotton or woollen goods; for a trade mark consists in the exclusive use of some name or symbol as applied to a particular manufacture

Trade mark distinguished from patent.—The distinction between a patent and a trade mark is this, that the former in effect prohibits all other persons not only selling but making for sale the article which is patented, whereas a trade mark merely indicates who was the maker of the article, and does not in any way prohibit others from making precisely the same article and in the same way. And hence it is that many persons who besides using a trade mark add the word patent, as if to give it greater authority, disentitle themselves to the ordinary remedy for infringement of such mark, seeing that they themselves have resorted to a species of fraud or misrepresentation.¹ For the use of the word patent deters manufacturers from examining and imitating, and perhaps improving on the original, and so benefiting the public.² And one characteristic of trade mark, which does not belong to copyright or patent, is, that the trade mark of an alien will be protected by the courts as fully as that of a native.³

Use of trade mark is to identify maker of goods.—The use of trade mark is thus a convenient mode of identifying the manufacturer or finisher of a particular article of commerce, which without some distinctive mark might be easily confounded with others nearly resembling it. It is a legitimate mode of signifying to the public this identification, as showing where, or by whom, or at what manufactory, an article was made; and as it tends to prevent deception and fraud the law lends its aid to protect the use of the mark, and so to enhance the value of the goods and secure to purchasers what they believe they are purchasing. It is beneficial to the seller and to the purchaser, for the latter being usually unaccustomed to distinguish minute differences, the mark is a patent and easily-ascertained mode of identification, saving him trouble and preserving him from mistakes.⁴ Supposing the rival trader to have

or vendible commodity, and such exclusive right is property. And for the same reason the plaintiff is entitled to relief, even if the defendant can prove, that he acted innocently and without any knowledge of the plaintiff's right."—*Westbury, L. C.*, *Hall v Barrons*, 4 *De G., J. & S.*, 150.

¹ *Ford v Foster*, L. R., 7 Ch. 611. ² *Flavel v Harrison*, 10 Hare, 467. ³ *Collins Co. v Cowen*, 3 K. & J. 428. ⁴ *Spottiswoode v Clark*, 2 Phill. 154; *Leather Co. v American L. Co.*, 11 H. L. C. 523.

obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price which the public are willing to give for them rather than for the goods of other manufacturers, whose reputation is not yet so high. Where, therefore, a manufacturer has been in the habit of stamping the goods which he has manufactured with a particular mark or brand, so that thereby persons purchasing goods of that description know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp. By doing so he would be substantially representing the goods to be of the manufacture of the manufacturer who had previously adopted the stamp or mark in question, and so would or might be depriving him of the profit he might have made by the sale of the goods, which *ex hypothesi* the purchaser intended to buy. The law considers this to be a wrong towards the person whose mark is thus assumed, for which wrong he has a right of action, or, which is the more effectual remedy, a right to restrain by injunction the wrongful use of the mark thus pirated.¹ The importance of having and being protected in the use of these trade marks was seen as early as 1590, where a clothier counterfeited a better clothier's mark, and the purchaser was held entitled to sue the seller for deceit.² But even Lord Hardwicke hesitated in 1742 to adopt the principle fully, lest it might tend to set up monopolies, for he said any one person may set up a rival inn with the same sign as the other.³

Infringement of trade mark not necessarily fraudulent.—For a long time it was thought that there must have been fraud in the person using another's trade mark to justify the court in interfering by injunction, till at last, in 1833, it was fully settled, that it is enough, that another's trade mark is used without his consent, if the effect upon the rightful manufacturer is to produce the same effect as if it were fraudulent.⁴ For the courts do not lay themselves

¹ *L. Cranworth, L. C., Seixs v Provezende, L. R., 1 Ch. 192.*

² *Southern v Howe, Cro. Jas. 471.*

³ *Blanchard v Hill, 2*

Atk. 484.

⁴ *Millington v Fox, 3 M. & Cr. 338; Hall v Barrows, 4 De G., J. & S. 150.* "Fraud is not necessary to be averred or proved in order to obtain protection for a trade mark. A man may take the

out to protect morality, or root out fraud, unless some private right requires it.¹ In every case the court must ascertain whether the differences are made *bonâ fide* in order to distinguish the one article from the other, whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colourable and the resemblances are such as are obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance which is of primary importance for the court to consider, because if the court finds, as it almost invariably does find in such cases, that there is no reason for the resemblance except for the purpose of misleading, it will infer, that the resemblance is adopted for the purpose of misleading.²

Registration of trade marks.—But as much confusion in rights may arise out of the use of trade marks, it was thought proper, in 1875, that a definite system of registration should be adopted, by which the rightful owner may register his trade mark with the Commissioners of Patents, and so make it more readily ascertainable by all who are interested in knowing it.³ And the inspection of the register should be open to the public.⁴ And the certificate of registration is to be evidence of the 'entry.'⁵ The regis-

trade mark of another ignorantly, not knowing it was the trade mark of the other, or he may take it in the belief mistaken, but sincerely entertained, that, in the manner in which he is taking it, he is within the law, and doing nothing which the law forbids. Or he may take it, knowing it is the trade mark of his neighbour, and intending and desiring to injure his neighbour by so doing. But in all these cases it is the same act that is done, and in all these cases the injury to the plaintiff is just the same. The action of the court must depend on the right of the plaintiff, and the injury done to that right."—*L. Cairns, L. C., Singer Co. v Wilson, L. R., 3 App., C. 376.*

"It does not signify for the purpose of the plaintiff's right to relief, whether the defendant has acted with a fraudulent intention or not; it is enough if, even without any unfair intention, he has done that which is calculated to mislead the public. And it is not the question whether the public generally, or even a majority of the public, is likely to be misled, but whether the unwary, the heedless, the incautious portion of the public would be likely to be misled."—*Glenny v Smith, 2 Dr. & Sm., 476.*

¹ *Batty v Hill, 1 H. & M. 264.* ² *Wood, V. C., Taylor v Taylor, 23 L. J., Ch. 255.* ³ 38 & 39 Vic. c. 91; 40 & 41 Vic. c. 37.

⁴ 38 & 39 Vic. c. 91, § 7. ⁵ *Ibid.* § 8.

tration of this trade mark is made a condition precedent to any remedy against infringement.¹ And the trade mark must contain the names of an individual, or firm, or a copy of the signature, or a distinctive device, mark, heading, label, or ticket.² And trade marks which had been used before the Act, if special and distinctive, might be now registered as they were, in conformity with the Act.

Usual characteristics of trade mark.—The trade mark protected by the statute is either a few words or a device or image, and these are either affixed to the article sold by stamp or label, or in some way adhering.³ The name selected as a trade mark need not be that of the real proprietor. When the name is that of a natural substance and is descriptive of the article, it soon ceases to be capable of protection, if other persons produce the same article in the same way, and nobody is longer deceived by the use of the word.⁴ And such common words as “superior, super-fine, nourishing,” “A No. 1,” and such like, are not sufficiently distinctive to serve the purpose.⁵ Yet a word from a foreign language may satisfy the purpose of being distinctive.⁶ And the name of the district where a particular article is made which has no particular connexion otherwise may be sufficiently distinctive, as the word “Glenfield” applied to starch made there.⁷ And even initials with a coronet, or circle, or device, may acquire this distinctive quality.⁸

Trade mark part of goodwill.—The trade mark is assignable and transmissible with the goodwill of the business with which it is connected;⁹ and passes on the death of the registered proprietor to his personal representative. And for all practical purposes the trade mark is part of the goodwill.¹⁰

Trade mark usually protected by injunction.—While the court will by injunction protect the registered proprietor against infringement, it must appear, that the circumstances

¹ 38 & 39 Vic. c. 91, § 1. ² Ibid. § 10. ³ *Singer Co. v Wilson*, 2 Ch. D. 434. ⁴ *Ford v Foster*, L. R., 7 Ch. 611.

⁵ *Raggett v Findlater*, L. R., 17 Eq. 29; *Hirst v Denham*, L. R., 14 Eq. 542. ⁶ *Ford v Foster*, L. R., 7 Ch. 611; *Cope v Evans*, L. R., 18 Eq. 138. ⁷ *Wotherspoon v Currie*, L. R., 5 H. L. C. 508. ⁸ *Re Barrows*, 5 Ch. D. 353. ⁹ 38 & 39 Vic. c. 91, § 2.

¹⁰ *Hall v Barrows*, 4 De G., J. & S. 150.

are such as would mislead a person of ordinary care and sagacity.¹ And the remedy is practically intrusted to the Chancery Division of the High Court.²

Offences as to trade marks.—The imitation of a trade mark was not deemed in the eye of the law a forgery of a document or writing, and so is not indictable, though an indictment for obtaining money by false pretences may lie in such cases.³ But now it is a misdemeanor to forge them, or apply such forged marks to goods.⁴ And it is not necessary to prove, that any particular person was intended to be defrauded.⁵

The Merchandise Marks Act protects in like manner those merchants whose marks are imitated, and enables persons wrongfully using them to be indictable for false pretences, or to be punished in a summary way before justices of the peace.⁶ To sell articles with a forged mark is punishable by justices with a fine,⁷ and the seller is bound to give information where he procured the article.⁸ And a person selling articles with a trade mark is deemed to contract, that such mark is genuine.⁹ And the same if an article is marked, as containing a particular quantity.

¹ *Singer Co. v Wilson*, 2 Ch. D. 434.
Rules, § 42.

³ *R. v Closs*, D. & B. 460.

² 38 & 39 Vic. c. 91;

⁴ 25 & 26 Vic. c. 88.

⁵ *Ibid.* § 12.

⁶ 25 & 26 Vic. c. 88.

⁷ *Ibid.* § 4.

⁸ *Ibid.*

§ 6.

⁹ *Ibid.* § 19.

OF THE
SECURITY OF PUBLIC WORSHIP.

CHAPTER I.

THE TENDENCY TO PUBLIC WORSHIP AND THE LAWS AS TO
SUNDAY, PROFANE SWEARING, AND WITCHCRAFT.

Tendency to public worship.—That division of the law, which treats of the security of public worship, differs from all the other divisions in this, that in the earlier stages of civilisation it is by far the most prominent. The laws of the Church for ages absorbed most of the attention of mankind, and subdued most of the details of daily life to absolute obedience. The necessity for some kind of public worship touches on obscurities that are endless, and which can neither be solved nor forgotten ; and all modes of government at first lend themselves to this primary instinct, and the ceremonies it demands. The minds of men are overpowered by the strength of the attraction, and a sense of the relative disproportions between one great central thought and all the perplexing minutiae that must be made subordinate and yet harmonious. Things spiritual and temporal float before the mind of barbarism in one continuous haze ; and no clue can be discerned by which their parts can be separated, assorted and consolidated, and by which the bounds of jurisdiction can be defined. It required the experience of centuries to discover, that some things, however desirable, were impossible ; that many more of the desirable things were impracticable ; and that it was the height of wisdom to relinquish this irritating pursuit after the impossible and the impracticable. Men, and the highest faculties of men, are at most only capable of being moulded to a very small extent by that kind of influence which laws can exercise ; and yet are conscious of still higher and deeper influences surrounding and underlying every one of them.

Ecclesiastical laws subject to amendment.—The main problems which lie at the foundation of this primary necessity of human nature for some kind of public worship are too remote and at the same time too important to require discussion in a work which professes to treat of the law. Law, as already explained, has no faculties to comprehend, and can supply no reasons to explain, why one part of human nature is more important than another, or why some minds are so constituted as to gravitate more or less towards one fixed idea—and why the intellectual and spiritual are mixed up with bodily wants and cares, and their correlative springs of action point in diverse and contrary directions. It is enough for the law to know and acknowledge, that men living together, having many desires, appetites, and affections, all seeking gratification—all jarring, and yet inextricably interwoven—are somehow best kept tranquil by allowing each individual so to act as to cause the least possible interference with his neighbours. But this was far from being the first notion of government. The ecclesiastics from their superior learning, having the first hold on all the high offices of state, and forming their own high standard of perfection—having a vague idea that all laws must be divine according to their notions of the divine—sought, without much consideration of what they were doing, to force people to do many things at the wrong time, and by the wrong means. They did not at first see the essential distinction between the end and the means. Some objects may be the best conceivable, but it does not follow that every person must or can or ought to be forced to submit, whether he will or no. By degrees it is discovered, that civil laws were no more of divine origin than thousands of other things, and require constant amendment; and the laws ecclesiastical, though long reluctantly preserved from the reforming hand of civilisation, are found also to require precisely the same treatment. The law, by whatever name called, and whencesoever derived, cannot make men perfect, but only helps them to be a little less imperfect; and as law is nothing without an adequate force behind it to compel, and yet can advance only so far as compulsion is possible, it was inevitable, that a vast variety of mistakes should have been made in misapplying the law to things that can never be controlled

or advanced by the law, though they may often be hindered and made impracticable by its abortive and purposeless interference. After centuries of experience the law has wisely retreated from most of these impossible undertakings. However elevated may be the standard of life known to ecclesiastics, it is found, that leaders of the Church have no greater insight into the art of governing men than others. Law is nothing except it be practical, and great part of its efforts must be expended on coarse and sordid details, and in dealing with which the keen edge of the higher morality and piety only cuts in unlooked-for directions. The great average of mankind are so made as to feel sensibly the importance of property and personal security, but they cannot be made to comprehend all the attractions of the unseen, the remote, and the future; and they will not by any species of compulsion be brought nearer to these distant attractions, unless on the condition of being first secured in the pursuit of their own pressing temporal wants, and that also in their own way.¹

Laws of God and Christianity as part of the law.—Though the laws relating to public worship are necessarily made up to a great extent of mere peculiarities relating to the property, modes of faith, and internal government of individual members of the Church of England, and so immediately concern only about half of the population, yet these details also concern the other half indirectly, because most of such peculiarities were once made compulsory on all, and in many respects at the expense of all, and they still react, to a considerable extent, on the rights and

¹ "There are problems in human nature and in human destiny whose solution is beyond this world, which are linked to an order of things unknown to the visible creation, but irrepressibly torment the minds of men, and which they are absolutely bent upon solving. The solution of these problems with the creeds and dogmas which contain, or at least profess to contain it, is the first object and the first source of religion."—*Guizot, Civ. Eur.* c. 5. "The object of all the public worships in the world is the same; it is that great Eternal Being who created everything."—*Chesterfield, Letters*. PLUTARCH said that a city might sooner exist without house or land than a state without a belief in the gods.—*Plut. ad Colot.* c. 31. "All religions owe their origin or acceptation to the wish of the human heart to supply in another state of existence the deficiencies of this, and to carry still nearer to perfection what we admire in our present condition."—*W. Wordsworth, 2 Forster's Landor, 25.*

property and security of those who are no longer under the superintendence of that Church which first shared the possession of the reins of government. It is thus necessary to state somewhat minutely what are the laws of the Church of England, in order that we may afterwards more clearly see, how the same practical results are obtained, without the aid of such laws, by that other half of the population who are called Nonconformists or Dissenters. But before proceeding to state the laws of the Church, there are three heads of law which ought to be disposed of, because they were once constituent parts of these laws, and owed their importance to the position first assigned to them as such, though, now that they are isolated, they maintain their ground as part of the general law for different reasons than those first relied upon. These are the laws relating to the profanation of the sabbath, profane swearing, and witchcraft. These laws were once treated as essential parts of Christianity, which again was long deemed part of the law of England. And though now the two former of these heads are independent of the laws of any one Church, they are nevertheless, for other good reasons, retained in our law. The laws of witchcraft also were long treated as part of the law of God, though they are now almost altogether obliterated, and it is only necessary to notice such faint traces of them as still remain.

Though it has long been a current phrase, that Christianity is part of the law of England, it has already been shown how that doctrine is misleading, and what is the precise length and breadth which it is capable of rightly assuming. It has been shown, that Christianity cannot correctly be stated to be a part of the law more than any other body of doctrines, whether of science, morality, or other branches of human knowledge, which are often taken notice of in order to determine some issue or incidental dispute between man and man. And as regards the offence of blasphemy and the laws that protect us against it, these have been fully set forth in the earlier part of this volume.¹

Profanation of the sabbath generally.—The sabbath

¹ As to Christianity being part of the law of England it has been aptly observed: "Was there ever an indictment for not loving our neighbour as ourselves?"—*Per Rolfe, B., 2 Crabb Robins. 21.* See *1 Pat. Com. (Pers.) 111.*

viewed as denoting one day's rest in seven, has apparently been part of the common law of nearly every nation, or at least there has been some division of time somewhat nearly corresponding to it. Even in Pagan times there was an approach to it in the number of recurring festivals in honour of strange gods or men.¹ The laws prohibiting common employments on that day were long deemed part of the laws of God, and therefore their violation was usually set down as an act of the grossest impiety. Our own statutes have again and again recognised this day as a leading qualification or exception to nearly every manual employment. And though the learned have differed as to the chief variation from the end to the beginning of the week, and its cause, and sometimes have speculated as to how far such an arrangement of time is a law of human nature rather than of any one nation, such singular unanimity shows, that if we had not inherited from the earliest times the practice of setting apart one day in seven for the exercises of religion and the highest morality, we must have been driven to invent it.² Our earliest statutes abound with

¹ The Athenians had festival days, which amounted to one-sixth part of the year. The ancient Greeks at feasts made it compulsory to sing hymns to the gods.—*Athen.* b. xiv. c. 24. The Roman pontiffs had similar difficulties to those of the moderns in solving what kind of work was to be allowed during the *feriæ publicæ*.—*Macrob.* l. c. And see *Dig.* 2, 12, 2. Marcus Antoninus increased the working days to 230, the rest being holidays.—*Capitol. M. Ant. Phil.* c. 10. The Incas ordered three holidays every month for diversion with games.—*Com. of Incas*, b. vi. c. 35. In China, though there are no Sundays, yet there are so many holidays that the result is much the same.—1 *Gray's China*, 260. The French National Convention, in 1792 abolished Sunday, and made divisions of time into ten days, one being for rest. The new arrangement lasted twelve years, when Napoleon, in 1805, restored the Gregorian Calendar.

² BAXTER thought that one day in seven, or thereabouts, for rest, was almost a law of nature—19 *Baxter's Works*, 187. "If keeping holy the seventh day were only a human institution, it would be the best method that could have been thought of for the polishing and civilizing of mankind."—*Addison, Spect.* No. 112. Whether a division of time into seven days had reference to the revolutions of the moon or to the seven planets, recognised in ancient astronomy, has perplexed the learned for many ages.—1 *Taylor's Nat. Hist.* 292; 1 *Humboldt's Research.* Amer. 284. But it was not a universal institution, being unknown to the Greeks and Etrurians, and being adopted from Egypt by the Romans only in the second century.—

notices, precepts, admonitions, and penalties, intended to secure, on the part of the whole population, this weekly exercise of at the least the forms of piety. And yet while many of these enactments still exist, they are enforced in modern times rather out of a profound persuasion that the public health is their sufficient justification. Hence a moderate degree of compulsion is used to secure to all one day of rest out of every seven. It is no longer, however, a merely ecclesiastical law, though it is still essentially an ecclesiastical custom and enters into the ritual of every sect. The varied employments still subjected to restrictions require, however, to be singled out under a few separate heads, in order fully to comprehend how far the law interferes by way of compulsion, or rather in defence of those inclined to join in this one practice.

Early English laws relating to Sunday.—Laws prohibiting labour on Sunday seem to have been adopted in all Christian countries at an early date after the Christian era. The Anglo-Saxons punished a master who ordered his servant to do servile work on Sunday with a fine.¹ And if a slave was ordered to work on that day, he was said to have thereby become a freeman.² They counted the Sabbath from Saturday evening at sunset to sunset, but a little later it was extended from 3 p.m. Saturday

Potter's Gr. Ant. b. ii. c. 26. The Japanese and Polynesians are also unacquainted with it at this day.—² *Davis, Chin.* c. 18.

The Jewish Sabbath included rest for beasts and servants as well as for masters.—*Exod.* xxiii. 12; xx. 10; *Deut.* v. 14. The learned have interpreted the punishments for breach of the Sabbath rest as confined to public and contemptuous defiance of the law.—*Numb.* xv. 32; *Michaelis*, § 249. And it is not easily settled whether the ancient Jews considered it as a day of recreation or not.—*Ibid.*; 1 *Milman, Jews*, 113. CONSTANTINE ordained, that the people should rest on Sabbath in towns, but thought that in the country the time could not be spared.—*Montesq.* b. xxiv. c. 23. And the Theodosian and Justinian Codes prohibited sports and public shows on Sunday:—*Cod. Theod.* b. xv. tit. 5; *Cod.* b. iii. tit. 12; and all secular employments, except works of necessity, and charity, and harvest work.—*Cod. Just.* iii. 12. The early Christians regarded it as a day of rejoicing, and to fast was unlawful.—*Bp. Lincoln on Tertull.* 388; *L. King's Prim. Ch.* And it was afterwards said, that, while Sunday was kept in the Western Church as a fast, it was kept in the Eastern Church as a feast.—*Bing. Chr. Antiq.* b. xx. c. 3.

¹ Leg. Withr.; Leg. Cnut.
Wigtred's Dooms. A.D. 696.

² Ine's Eccl. L., A.D. 693;

till break of day on Monday.¹ The same laws also prohibited actions or public executions and arrests on that day; also marketings and purchases, huntings, and worldly works.² Yet there was always something vague in the object of these laws—whether it was for recreation or austerity. In 1359 Sunday was a day of fairs, and feasting, and fighting, in at least some places; and so it long continued.³ Fairs and markets were definitely prohibited by a statute of Henry VI. to be held on Sundays or festivals, and that statute is still in force.⁴ A statute of Edward VI. forbade working on Sundays, but excepted harvest workers, labourers, and fishermen.⁵ In Queen Elizabeth's time a chief justice was reported to have said that it was contrary to law to enforce Sunday austerity.⁶ And at that date plays used to be performed in theatres on Sundays.⁷ The canons of 1603 (c. 13) ordered all persons to keep the Lord's Day, and therein followed the statute of Edward VI. Next James I. and Charles I.—the latter at the instigation of Laud—issued declarations forbidding persons who wished to enjoy the usual sports on that day from being disturbed,⁸ the opinion being, that the Puritans were over strict, and alienated the people, leaving them exposed to the influence of Jesuits and Papists.⁹ The statute of Charles I.

¹ Leg. Edgar, c. 5; Edw. Conf. Leg. c. 3; Leg. Cnut, c. 14.

² Athelst. leg. c. 24; Cnut, leg. c. 15; A.D. 1017. The civil law and Eastern Code all treated general work on that day as unlawful, but with a vague exception in favour of agriculture. The Burgundians, the Alanians, the Bavarians, Frisians, Franks, all had like laws, and punished their infraction with scourging or fine.

³ 1 Young's Whitby, 411.

⁴ 27 Hen. VI. c. 5. Since 1833 all elections of vestries and corporation officers and public companies must take place either before or after Sunday, if by any authority they had been appointed for that day.—3 & 4 Will. IV. c. 31.

In Scotland the first statute was 1503, c. 83., prohibiting markets and fairs on holidays. The Presbyteries were ordained under the act 1693, c. 40, to appoint searchers or informers of these offences. It was decided in 1837, that the statute 1579, c. 70, which prohibited using of handy labour and working, prohibited shaving of people in shops on Sundays.—Philip v Innes, 2 Sh. & McL. 645. That statute is held to prohibit all shops being open for selling goods.—Bute v Moore, 43 Sc. Jur. 65.

⁵ 5 & 6 Ed. VI. c. 3. ⁶ 1 Neale's Pur. 451. ⁷ Collier, Introd. Northcote (Shaksp. Soc.) 14; D'Israeli, Jas. I. 345. ⁸ 1618, 1633, 2 Neale's Pur. 105 (ed. 1822); 2 Rushw. 193. ⁹ 3 Fuller, 270.

still in force, while allowing lawful games or May-poles, and morris dancing, out of people's own parishes, at the same time forbade the unlawful sports of bear and bull baiting, and plays within one's own parish.¹ The Long Parliament in 1643 ordered the declaration of James I. to be burnt by the common hangman in Cheapside. The Puritan ordinance in 1644 prohibited persons from selling goods or carrying burdens or doing any worldly labour on that day, under penalties. Persons above fourteen wrestling, shooting, or masking incurred a penalty of five shillings; and the parents or guardians of the offending children, one shilling. Yet dressing of meat in inns, and crying milk between certain hours were excepted from punishment.²

General work and selling of goods.—The older statutes being repealed, the modern law is still represented by the statutes of Charles I. and Charles II.³ By the statute of Charles II. in 1676 no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day, or any part thereof; works of necessity and charity only excepted. Any person above fourteen is liable to a penalty for such offence. And no one is to publicly cry, show forth, or expose to sale any wares, fruit, or any goods whatsoever on that day. Nor were waggoners, drovers, or butchers to travel. But nothing was to prohibit the dressing of meat in families, in inns, cookshops, and victualling houses for such as otherwise could not be provided; nor to prohibit the selling of milk in certain hours. And all offences were to be prosecuted within ten days.⁴ The interpretation of this Act has often exercised the ingenuity of courts, for the exception of works of necessity and charity gave a handle to get rid of the enactments. And the other difficulty lay in distinguishing what were works of one's ordinary calling.

Work of one's ordinary calling.—It was decided more than a century ago, that the work of bakers was one of necessity. Hence a baker who baked puddings, and pies, and pastry for customers was held to be not punishable by the Act, because this might well be deemed an act of

¹ 1 Ch. I. c. 1.
² 29 Ch. II. c. 7.

² Scobell, Ordin. 68.

³ 3 Ch. I. c. 1;
⁴ 29 Ch. II. c. 7.

necessity and charity; or at least a baker's shop was a cook's shop and expressly excepted. As Lord Mansfield said, the Sabbath would be much more generally observed by a baker staying at home to bake the dinners of a number of families than by those families staying at home to dress their own dinners.¹ And when a baker was prosecuted for baking an apple-pie on Sunday for one of his customers, Lord Kenyon boldly declared he would construe a statute like this equitably; and as people must be fed on Sunday as well as other days, and though only cook-shops were expressly excepted, baker's shops were equally implied in the exception also.² These cases thus set the example of construing liberally this act in favour of freedom from the prohibitions. And the legislature had to interpose in 1794 and put down this baking of pies and puddings.³ At last the modern Bread Acts practically superseded the act of 1794, and repeated more definitely the prohibition against baking or selling bread on Sundays and against baking pies and puddings for anybody on any pretext, except between 9 A.M. and 1.30 P.M.; and except so far as to prepare for baking on Monday.⁴ And this is the footing on which the law still remains as regards bakers.

Moreover, the act did not prohibit labour, business, or work of every description, but only restrained a few people exercising their "ordinary calling;" and hence if a farmer hired a labourer on the Sabbath day, or one not a horse-dealer sold a horse by private contract, this was deemed a mere occasional act, and not part of the "ordinary calling."⁵ So the statute was held not to apply to the business of an attorney;⁶ or to the business of a farmer, even though he worked himself occasionally as a labourer.⁷ Nor did the statute apply to any exceptional work not within the scope of one's ordinary calling, as in case of haymaking to take advantage of the weather;⁸ or the giving of a bill of exchange;⁹ or the hiring of a servant;¹⁰

¹ *R. v Cox*, 2 Burr. 785. ² *R. v Younger*, 5 T. R. 449.

³ 34 Geo. III. c. 61. ⁴ 3 Geo. IV. c. 106, § 16; 6 & 7 Will. IV. c. 37, § 14. Penalty 10s., and double on second offence, &c.

⁵ *R. v Whitnash*, 7 B. & C. 596; *Bloxame v Williams*, 3 B. & C. 232; *Fennell v Ridler*, 5 B. & C. 406; *Smith v Sparrow*, 4 Bing. 86.

⁶ *Peate v Dickens*, 1 C. M. R. 422. ⁷ *R. v Cleworth*, 4 B. & S. 927.

⁸ *R. v Silvester*, 33 L. J., M. C. 29. ⁹ *Begbie v Levy*, 1 Cr. & J. 180.

¹⁰ *R. v Whitnash*, 7 B. & C. 596; *Norton v Powell*, 4 M. & Gr. 42.

or the enlistment of a soldier;¹ or the carrying of passengers in a stage coach.² In later times the Factory Act absolutely prohibits the employment of a child, young person, or woman in a factory or workshop on Sunday.³ And the employment of women, young persons, and children in mines on Sunday is absolutely prohibited.⁴

The courts also came to the conclusion that however many illegal acts were done in the course of the Sunday, as, for example, in trading on that day, yet only one penalty could be recovered.⁵ For, as Lord Mansfield said, if a tailor sew on the Lord's Day, it is not to be treated as if every stitch he takes is a separate offence.⁶ And though an alternative punishment was the putting of the offender in the stocks,⁷ all commitments must now be to the house of correction or the common gaol.⁸

Though, however, the statute of 1676 has not been repealed, yet the enforcement of it is no longer left open to the indiscriminate zeal of every informer. The consent of the chief officer of police or of two justices is now required, before a private prosecutor can institute proceedings.⁹ And hence care is taken that no real public inconvenience is caused by interfering with the customs and wants of the poorest fellow-citizens.¹⁰

Travelling on Sunday. — In 1627 a statute of Charles I. had prohibited under a penalty of 20s. all carriers and waggoners from travelling on Sunday.¹¹ The statute of 1676 went further and prohibited generally all persons regularly travelling on Sunday except for a cause to be allowed by two justices of the peace.¹² Hackney coaches were by statutes of William III. and Anne also

¹ *Wolton v Gavin*, 16 Q. B. 48. ² *Sandiman v Breach*, 7 B. & C. 96. ³ 41 Vic. c. 16, § 21. A slight exception is made for Jewish factories.—*Ibid.* § 51. ⁴ 35 & 36 Vic. c. 76, § 12.

⁵ *Cripps v Durden*, Cowp. 643. ⁶ *Ibid.* ⁷ *R. v Barton*, 12 Q. B. 389; 13 Q. B. 393. ⁸ 11 & 12 Vic. c. 43, §§ 19, 21. ⁹ 34 & 35 Vic. c. 87.

¹⁰ LORD CHELMSFORD said, that the Sunday Act of Charles II. had been made null by the courts holding, that keeping open a shop was neither exposing to sale nor selling, and by holding that only one penalty could be recovered for one day.—157 *Parl. Deb.* (3) 443. Yet though the subject had been investigated by three committees at great length in 1832, 1847, 1850, no amending act could be carried in Parliament.

¹¹ 3 Ch. I. c. 1. ¹² 29 Ch. II. c. 7, § 2.

prohibited from plying on Sunday under a penalty of 5*l*.¹ But in 1831 the prohibition to ply on Sundays was repealed as to metropolitan hackney carriages;² and as to all hackney coaches in 1867. And the courts also held, that though the statute of 1676 applied to waggons and stage-vans, yet it did not apply to stage-coaches.³ When railways were authorised by statutes, there was nothing expressly provided so as to prevent them being used on Sundays. And if a railway company give a ticket for left luggage, undertaking to deliver it up on request and do not except Sunday, they will be liable for not having their office open on that day.⁴ And no statutory prohibition ever extended so far as to prevent persons using their own vehicles, at least since the legislation of the Commonwealth. And where a canal company made a byelaw prohibiting the use of the canal on Sunday, and drew a chain across the canal to prevent the public travelling on that day, such byelaw was held altogether void.⁵

Sports and games on Sundays.—The statute of Charles I. prohibited only bear-baitings and bull-baitings, common plays, or unlawful sports on Sundays, and these had a definite and limited meaning. As regards theatres, these being all subject to regulations prescribed by the Lord Chamberlain and the justices of the peace, who can dictate their own conditions, performances are prohibited on Sundays and certain other days.⁶ The pursuit of game on Sundays is now expressly regulated by statute. A penalty of 5*l*. is imposed on all persons who on Sundays or Christmas day either kill or take game, or use dogs, nets, or guns, or other engines for the purpose of killing or taking them.⁷ And setting a snare on Saturday night which remains in catching order on Sunday is an offence within this enactment.⁸ This prohibition, however, applies

¹ 1 & 2 Will. IV. c. 22; 3 Will. IV. c. 19; 3 & 4 Will. IV. c. 31; (5 & 6 W & M. c. 22, § 18; 9 Anne, c. 17; repealed in 1867).

² 1 & 2 Will. IV. c. 22, § 37. ³ *Sandiman v Breach*, 7 B. & C. 96; *R. v Middleton*, 3 B. & C. 164. ⁴ *Stallard v G. W. R. Co.*, 2 B. & S. 419.

⁵ *Calder v Pilling*, 14 M. & W. 76. The regular travelling of stage coaches and waggons began about 1770.—2 *Bp. Watson's Life*, 113.

⁶ 6 & 7 Vic. c. 68, § 9.—See *ante*, 309.

⁷ 1 & 2 Will. IV. c. 32, § 3. ⁸ *Allen v Thompson*, L. R., 5 Q. B. 336.

only to game strictly so called, and does not affect rabbits and snipe and other birds of less degree. With regard to fishing on Sundays, the statutes are not so stringent. For while persons are prohibited from fishing for salmon on Sunday with nets or engines, those who angle only for such fish are not so prohibited.¹ And as to other fish, there is no prohibition whatever as to the means or the kind of fish caught on that day.

Legal business on Sunday.—It was also a very ancient regulation that no legal business should be transacted on Sunday. According to the old Roman law no juridical business was done on festivals.² And Constantine extended the rule to the Christian Sunday, peremptorily forbidding the hearing of causes on that day.³ And yet an exception was made as to flagrant crimes, such as those of the Isaurian pirates, so as to preserve innocent men from wicked designs.⁴ And Valentinian made a further law that all arrests for debt on that day should be prohibited.⁵ And a long-forgotten law of Honorius made it the special duty of judges on that day to visit the prisons and see that no prisoner was without food or even a bath.⁶ Under King Childebert of France in 549 the Fifth Council of Orleans made a like decree.⁷ Lord Mansfield said that anciently courts of justice did not sit on Sunday. But the early Christian judges purposely sat on that day, in order to show their opposition to the heathens, who superstitiously observed some days as lucky, and others as ominous and unlucky, and also in order to enable plaintiffs to come to their courts in preference to the heathen courts. Then after the sixth century canons of the Church gradually introduced a contrary practice. These canons were adopted and ratified by Saxon and Norman kings, and carried the prohibition too far; and then again statutes began to relax such prohibition in some points.⁸ It was therefore treated as part of the common law, that no courts shall sit and no judicial acts be done on Sunday.⁹

The Sunday Act of 1676 confirmed the like practice in England, by enacting that no process or judgment of a

¹ 24 & 25 Vic. c. 109, § 21.

Theod. 2, 8.

⁴ Ibid. 9, 35.

² Dig. 2, 12 de feriis.

⁵ Ibid. 8, 8.

³ Cod.

⁶ Ibid. 9, 3.

⁷ Conc. Aurel. V. c. 20.

⁸ 3 Ed. I. c. 51; Mirror, c. 5, § 1;

2 Inst. 264.

⁹ Swann v Browne, 3 Burr. 1600.

court of law in civil matters can be served or made on Sunday, being altogether void ; and the person serving or executing such process is liable to an action for damages.¹ And hence during the time when imprisonment for debt was in universal use, the debtor was always entitled to walk abroad on Sunday secure from all molestation from bailiffs. But in cases of treason, felony or breach of the peace, there was an express exception in the above statute. And this exception is still the law, and it has been carried further, for now, in all criminal proceedings whatsoever relating to any offence, including misdemeanour, a justice's warrant to apprehend a person charged with crime may be issued and executed on Sunday.² On the other hand, even a commitment for nonpayment of a fine, or penalty, or rate cannot be executed on a Sunday, these being civil process.³ When bills of exchange fall due on Sunday, any of the required acts may with regard to these be legally done the day after, and sometimes must be done the day before ; and the same rule has been extended to Christmas day and Good Friday and Bank holidays.⁴ The modern practice of courts is still based on the Act of 1676. Writs in actions can neither be issued nor served, nor returned, on Sundays ; so with writs of execution, attachments, and subpœnas to witnesses, and affidavits. And when the time limited for doing any act in compliance with rules of court expires on Sunday, the thing can be legally done on the following day.⁵

Houses of entertainment and debating societies on Sunday.—Though there is no general law prohibiting public meetings being held on Sunday, yet a qualification was introduced in 1781, as to two kinds of societies and meetings. Houses, and rooms, and places used for public entertainment or amusement, or for public debating on

¹ 29 Ch. II. c. 7, § 6. ² 11 & 12 Vic. c. 42, § 4. ³ *Ex p. Egginton*, 2 E. & B. 717.

⁴ 7 & 8 Geo. IV. c. 15 ; 39 & 40 Geo. III. c. 42 ; 34 & 35 Vic. c. 17 ; 39 & 40 Vic. c. 36, § 8 ; 38 & 39 Vic. c. 13. On one occasion LORD MANSFIELD said he would sit on Good Friday for the trial of causes. Counsel protested and would not attend ; whereupon the judge allowed the solicitors to conduct the cases. SERJEANT DAVY told the judge, that there had been no precedent for such a sitting since the time of Pontius Pilate.—1 *Crabb Robins. Diary* 472.

⁵ Jud. Act, Orders of Court, 57.

any subject whatsoever on any part of Sunday, are deemed disorderly houses or places, if people are admitted to them by payment of money or by tickets sold for money. And the keeper of the house was made liable to a penalty of 200*l.* for each day of the offence; and smaller penalties were declared against the manager or chairman, the door-keeper, or the person advertising such amusement.¹ Any person acting as master is deemed the keeper, though not the real owner or occupier, and if several so act, each is liable. And if people, without payment at the door, are admitted, but pay greater than usual prices for refreshments when within, this is deemed admission by payment. And if subscribers or contributors at their expense allow people to enter with their tickets, this is deemed also equivalent to admission on payment of money.² And even to advertise such places of meeting is punishable with a penalty of 50*l.*³ These penalties may, however, be remitted by a secretary of state.⁴ In one case a body called Recreative Religionists, who were duly certified under a late statute,⁵ kept a place of meeting for lectures, sermons, and sacred music, but this was held not a place of public entertainment or amusement, and so no penalty was incurred.⁶ On the other hand, an aquarium, where the public are admitted on payment to see live fish in tanks and hear music and see stuffed animals and curiosities, has been

¹ 21 Geo. III. c. 49, § 1. ² Ibid. § 2. ³ Ibid. § 3.

⁴ 38 & 39 Vic. c. 80. ⁵ 18 & 19 Vic. c. 81.

⁶ *Baxter v Langley*, L. R., 4 C. P. 21. The immediate occasion of this act was the popularity of two noted establishments in London which were used on Sundays, and admission money charged. One was Carlisle House, a promenade for profligate people meeting. Another was a Sunday debating society, where a passage of Scripture was selected, and ladies and gentlemen in turn debated and stated doubts and difficulties thereon, said to be in the manner of sceptics.—Hodgson's *Life of Bp. Porteous*, 71. The bill was opposed on the ground that religion was good for nothing if it did not bear discussion; yet it passed by an overwhelming majority.—22 *Parl. Hist.* 267. A BISHOP told the House of Lords that Lord Thurlow, L. C., Lord Mansfield, C. J., and Skinner, C. B., revised this bill. Yet it was thought at the time to be an arbitrary, partial, and unwise measure.—*Ann. Reg.* 1781, p. 147. A constable arrested L. Harcourt, L. C., for travelling on Sunday during church hours; and the head of the law was obliged to draw up at the nearest church and join in divine service before he resumed his journey.

deemed a place of entertainment and amusement within the meaning of this Act.¹

Before the statute which gave power to a secretary of state to remit the fines under this statute, an abuse existed of an informer suing and then returning the fines in order to prevent future informers doing the same thing; but this practice the court defeated by treating the first judgment as obtained by covin and collusion.²

Opening of public houses on Sunday.—One important and prominent part of Sunday legislation refers to the opening of public houses and places for the sale of intoxicating liquors, and this has been regulated by the legislature by special Acts from the time of Edward VI. The latest revised enactment was in 1874. By that Act these houses within the metropolitan district, or four miles from Charing-cross, must be closed all Sunday morning until 1 o'clock p.m. and then again at 11 o'clock p.m. In the rest of England and Wales the houses must be closed till half-past 12 p.m. on Sundays and then again at 10 p.m.³ Besides these hours of closing there is a further time of closing which applies to all the licensed houses wherever situated, namely, during afternoon service, that is to say, between half-past 2 p.m. or 3 p.m. and 6 p.m. respectively, according as the first closing period ends at half-past 12 or 1.⁴ Whoever opens his licensed house on Sundays during the above closing hours incurs a penalty of 10*l.*, and on a second offence a penalty of 20*l.*⁵ It is true that an exception is made in favour of *bond fide* travellers, who are at all times entitled to admittance and refreshment;⁶ and railway station refreshment bars are not restricted, provided travellers arriving or departing by train seek refreshment.⁷ But other persons, not travellers, are liable to a penalty of 40*s.* if found within licensed houses during these prohibited hours without any lawful excuse.⁸ Moreover, refreshment houses where intoxicating liquors are not sold must be closed on Sundays till 4 a.m.⁹

¹ Terry *v* Brighton Aq. Co. L. R., 10 Q. B. 306; Warner *v* Brighton Aq. Co. L. R., 10 Exch. 291. ² Girdlestone *v* Brighton Aq. Co., 3 Exch. D. 137. ³ 37 & 38 Vic. c. 49, § 3. ⁴ Ibid.

⁵ Ibid. § 9. ⁶ Ibid. § 10. ⁷ Ibid.; Peache *v* Colman, L. R., 1 C. P. 324. ⁸ 35 & 36 Vic. c. 94, § 25. ⁹ 27 & 28 Vic. c. 64, § 5; 35 & 36 Vic. c. 38, § 11.

The question who is a *bond fide* traveller within the meaning of these statutes, and so entitled to be admitted and served at all hours on Sundays with refreshment in licensed inns, has caused difficulties, and the legislature attempted to define his status circuitously. He is not to be deemed a traveller unless the place where he lodged during the preceding night is at least three miles distant from the place where he demands to be supplied with liquor, and such distance is to be calculated by the nearest thoroughfare.¹ And a mistake of the innkeeper, after taking all reasonable precautions to discover if the traveller is a *bond fide* traveller, will not subject him to penalties.² It is, on the other hand, an offence, falsely to pretend that one is a *bond fide* traveller.³ But so long as the distance travelled satisfies the statute, it is wholly immaterial whether the object of the traveller was business or pleasure.⁴

Offence of profane swearing.—It seems to have been a proclivity of human nature in all ages and countries to indulge in profane swearing; and though there has always been some uncertainty in defining the precise characteristics of the offence, it has mostly been deemed an offence, or at least a weakness to be censured, and according to the circumstances has even called for some substantial punishment. It is an offence now wholly confined to the vulgar, who seek by loud, incoherent, and irrelevant vociferations of the highest names and transactions to conceal their own want of thought and most of all their poverty of expression. When angry passions and rage distend such a soul beyond its feeble powers of utterance, it seeks in this way to relieve its conscious impotence by monosyllables repeated without a beginning, a middle, or an end. This vehemence of sound only strikes awe into the ignorant, but yet it so offends those who are orderly and accustomed to self-restraint as to be a substantial interference with each person's comfort, and on that account calling for a moderate punishment. One reason, why cursing and swearing was treated as an offence, was said to be its tendency to make men careless of veracity and ready to commit perjury. The Jews treated swearing by false gods or cursing with the name of the true God as an offence punishable by scourg-

¹ 37 & 38 Vic. c. 49, § 10. ² Ibid. ³ 35 & 36 Vic. c. 94, § 25.

⁴ Taylor v Humphries, 10 C. B., N. S. 429.

ing.¹ Plato thought that any chapman puffing off goods with an oath should be well beaten, and that no action should lie for the assault.² The ancients, indeed, seem not to have treated profane swearing as a substantive offence. The early Christians, however, soon denounced it. Chrysostom preached the whole of one Lent against it, and took care to distinguish between necessary and unnecessary occasions for oaths. But as oaths were then taken to ratify every contract, it was difficult to establish such a distinction.³ In 1623 a statute of James I. enacted, that whoever profanely cursed or swore incurred a fine of twelvenpence, for the nonpayment of which he might be set in the stocks three hours; and if under twelve he was to be whipped.⁴ But two witnesses were required. Another statute in 1694 allowed one witness to prove the offence and assigned gradations of punishment, and allowed children under sixteen when thus offending, to be whipped. And the Act was to be publicly read four times every year in parish churches and chapels immediately after morning prayer, under a penalty of 20s. for neglect.⁵

The extent of punishment for swearing.—At length, in 1745, an elaborate statute, repealing the former Acts, was passed, which still regulates the punishment of

¹ Lev. xix. 12; Selden de Jur. b. ii. c. 13; 4 Michaelis, 93.

² Plato, leg. b. ii.

³ Cod. Theod., B. 2, tit. 9 de pact. It was said that Christians used to relieve their consciences by swearing by the emperor's safety instead of by the emperor's good genius, as this last form was deemed profane and as implying divine honours to a demon.—*Tertull. Ap. c. 32.* An oath current in early centuries was "swearing by the creatures," which was a form of pawning some things specially dear, to abide the event of what they spoke turning out to be false; and this was deemed excusable; but fine distinctions were made. Thus ST. BASIL said when JOSEPH swore by the safety of Pharaoh's beard it was not properly an oath. Justinian treated profane oaths as blasphemy and punishable with death.—*Nov. 77, §§ 1, 2.* Donald VI. of Scotland ordered profane swearers to have their lips seared with a hot iron.—*H. Boet. b. x.* In this country the Puritans were said to have considered swearing worse than murder.—11 *Percy Soc. (Rich. How. 6.)*

⁴ 21 Jas. I. c. 20.

⁵ 6 & 7 W. III. c. 11. Profane swearing, as may be supposed, was severely punished by the Long Parliament, and several Acts were passed for the purpose.—*Scobell's Acts 1650, c. 16.* One of the articles of impeachment of Scroggs, C J., was, that in his common discourse at dinner in the house of a gentleman of quality he publicly and openly uttered oaths and curses.—8 *St. Tr. 170.*

profane swearing, and this it does in a somewhat peculiar manner, namely, by a tariff of punishments proportioned to the social grade of the offender. And mankind are divided for this purpose into three grades only.¹ The court, before this Act, as in the case of slander and libel, insisted that when a conviction was made by justices of the peace, the very words of the oath should be set out, so that the court might judge whether it was or was not an oath, that being deemed a nice point of law.² The Act at last gave a form of conviction, overruling such a necessity. One characteristic rule of interpreting this statute was adopted, which differed from that formerly mentioned as regulating the catching of game on Sunday ; for while any person who hunts and kills any number of heads of game on a Sunday is deemed to commit only one offence, the older judges, by a happy thought, decided, that each separate oath is capable of separate valuation. Hence, if a volley of oaths is discharged, and the witness is a fair arithmetician, the court will, on his estimate, assess each repetition at a separate sum, as was the case of the miller, who discharged a volley which cost him as much as 2*l.*, inasmuch as a bystander counted twenty of these vain repetitions without stopping.³ Another peculiarity attending this

¹ "If any person shall profanely curse or swear and be thereof convicted, on the oath of any one or more witness or witnesses before one justice of the peace or by the confession of the party offending, he shall forfeit as follows, that is to say, every day labourer, common soldier, common sailor, or common seaman, 1*s.* ; every other person under the degree of gentleman, 2*s.* ; and every person of or above the degree of a gentleman, 5*s.* ; for a second offence after a former conviction, double these sums ; and for a third or subsequent offence, treble."—19 Geo. II. c. 21, § 1. If the cursing or swearing be in the presence of a justice of the peace, he may convict the party without further proof.—*Ibid.* § 2 ; if in the presence of a constable the latter may apprehend the party without a warrant if unknown, and carry him before a justice, in order that he may be convicted ; and he is also to lay an information against those who were known.—*Ibid.* § 3. The penalty is to be applied to the poor of the parish, where the offence is committed.—*Ibid.* § 10. For non-payment of the penalty the justices may commit for ten days to the house of correction.—*Ibid.* § 4. A constable not doing his duty is liable to a fine of 40*s.*—*Ibid.* § 7. And justices not doing their duty are liable to a fine of 5*l.*—*Ibid.* § 6.

² *R. v Sparling*, 8 Mod. 58.

³ *R. v Scott*, 33 L. J., M. C. 15. A leather-dresser in Clerkenwell

offence was, that if the offender was a soldier or sailor, and could not pay the fine, he was put in the stocks for an hour or two, an alternative which, though never in terms repealed, is now indirectly superseded by imprisonment in the house of correction or common gaol.¹ And the statute repeated the older enactment of William III., requiring the Act to be publicly read in churches immediately after morning or evening service four times every year, under an increased penalty of 5*l.*; and this last enactment was in force for more than a century, not being repealed till 1823.²

Witchcraft and fortune-telling.—The great variety of treatment accorded to witchcraft was one of the notable characteristics of all ancient laws, and no country seemed to omit some provision adapted to the current notions of its iniquity.³ The proclivity of human nature towards such offences was always assumed to arise from a direct impulse of Satan, and the offence was called one against the laws of God. Thus it was a serious matter in our ancient laws till the time of Holt, C. J., who began to treat it simply as a combination of lunacy, fatuity, and imposture. A marvellous levity, however, has since then taken possession of the public mind in regard to its whole bearings, so that it is scarcely practicable to treat witchcraft or any of the kindred offences with a gravity becoming the injury not unfrequently done to those, whose simple faith has never been similarly enlightened. Witchcraft, as one of the earliest known crimes, was treated as felony in England, and punished before the Conquest with death by burning or with exile; the only reason that occurred to Coke for this severity was, that it was a conferring with the devil.⁴ A statute of James I., repealing former statutes, still treated witchcraft as felony, and its punishment was death,⁵ the main offence being that of conjuring

also once swore 54 oaths and 160 curses without stopping, which cost him 21*l.* 8*s.*—*R. v Sparling*, 1 *Str.* 497.

¹ See 2 Pat. Com. (Pers.) 282.

² 4 Geo. IV. c. 31. While this enactment stood, clergymen were often out of revenge informed against for its neglect.—8 *Parl. Deb.* (2) 615.

³ See 2 Pat. Com. (Pers.) 288.
c. 12.

⁴ 3 Inst. 43.

⁵ 1 Jas. I.

an evil spirit ; and to profess by enchantment to discover hidden treasure or stolen goods was one of its forms.¹ But that statute was wholly repealed in 1736, and no prosecution was thereafter to be allowed in any court, for witchcraft, sorcery, enchantment, or conjuration. The only cognate offence that remained was pretending to powers whereby ignorant persons were frequently deluded and defrauded. Hence, if any person pretend to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertake to tell fortunes, or pretend from skill or knowledge in any occult or crafty science to discover, where and in what manner goods or chattels supposed to have been stolen or lost may be found, this is an indictable offence punishable with one year's imprisonment.² Another form of the above offence as to telling fortunes was also punished by the Vagrant Act, which enacts, that every person pretending or professing to tell fortunes, or using any subtle craft, means, or device by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects, is deemed a rogue and vagabond, and is liable to three months' imprisonment in the house of correction.³ And where a person falsely pretended to

¹ The capitularies of Charlemagne and the laws of ancient Norway had penal statutes against those who raise storms and tempests ; and the lingering tradition in the far north is, that witches sell winds to the sailors.—2 *Mallet, North. Antiq.* 218. Witchcraft and calculating nativities were always deemed the works of Satan.—*Gotho. Cod. Theod.* b. 9, tit. 16. In Scotland, witch finding and burning was a leading pursuit for centuries. The Presbytery often found time to take the depositions preliminary to trial. In 1667 a noted common pricker lived in Tranent who had skill to discover the devil's mark and to insert a pin three inches long into that spot of the body. The test was to ask the witch in what part of the body this pin was inserted, and if a genuine witch, she always misstated the spot.—3 *Pitcairn's Trials* 602. Mr. Mathew Hopkins was the leading witchfinder in England about the same period.—6 *St. Tr.* 654. In 1649, on the burning of a witch at Burncastle, near Lauder, the expense of the common pricker and of the hangman (from Haddington), both of whose services were required (and who were entertained with meat and drink and wine), together with expense of the witch's meat for thirty days while she was watched in prison, came to 92*l.* 14*s.*, Scots. —*Arnot's Trials* 434.

² 9 Geo. II. c. 5. Pillory was added once a quarter. This Act also applied to Scotland.

³ 5 Geo. IV. c. 83, § 4.

have a supernatural faculty of obtaining messages from the spirits of the dead, this was deemed within the words "palmistry or otherwise."¹ And it is said, a conviction may be had under this enactment without even describing that the means used was palmistry.²

¹ *Monk v Hilton*, 2 Exch. D. 268. ² *R. v Middlesex*, JJ. 2 Q. B. D. 519.

CHAPTER II.

MEANING OF WORDS AND PHRASES RELATING TO THE
CHURCH AND CONVOCATION.

Early confusion about Papal ecclesiastical jurisdiction.—Much of the early ecclesiastical law consists of manifestoes and protests by the English Parliament against the common delusion of the middle ages, that the Pope had jurisdiction over the internal affairs of the Church in England; and yet that delusion was so deeply engrained in the mind of the legislature, as well as of the statesmen of the day, that little reflection was given to the first principles on which all governments are founded. It was not known as a practical axiom, that each legislature has full power to make and alter its own laws without any regard to foreigners, and that there is nothing known under the name of law, whencesoever derived, which is so divine as not to be capable of amendment by such legislature. Moreover nothing exists as law which is not capable of being enforced more or less effectually by some recognised jurisdiction, which is provided for that purpose with an adequate machinery of bailiffs, messengers, and executioners.¹

¹ From the fourth to the thirteenth century, the Church took the lead in the career of civilisation, such as it was.—2 *Guizot, Civ. Fr.* lect. 11. The theory of Innocent III. was, that the pontifical and regal powers were in the same relative position as the sun and moon. And this is the key to the modes of thought on such subjects for many centuries. William the Conqueror denied that he owed homage to the Pope, and that his predecessors had owed it.—1 *Stubbs's Hist.* 285. The pusillanimity of John made him the vassal of the Pope, and the annual payment of 1,000 marks was paid off and on till 1366, when the Parliament of Edward III. declared John's con-

Meaning of the words "Church and State."—There are no three words in the English language which usually embody so much confusion of thought as the words "Church and State." They are seldom used to indicate a real and accurate perception of anything corresponding to them in law or human government. They no doubt began first to be adopted when the chief governors of the world were ecclesiastics, who were imbued with the belief that, because there are things in heaven above those of the earth, therefore there should be a grand division made between one class of laws and another class—one denoting superiority and precedence, the other denoting inferiority: one indicating a higher life, approaching that of angels, the other denoting a downward and grovelling class of subjects—one towards which all mankind should be driven, the other as to which they need only be detained, coerced, and cautioned. The moment it is comprehended that governments and laws have no means of forcing citizens to be better than they choose to be, and that the utmost that can be accomplished is to prevent each from interfering with another's pursuits, and from making each other worse than they may be, it is at once apparent that the relative importance and force of laws cannot be adjusted according to the subject-matter upon which they touch. As laws cannot enlighten the conscience, can neither implant piety nor virtue, can neither elevate man into a higher life nor give him the slightest impulse towards the advancement of public good, but have only a negative and repressive effect on the varieties of evil, aggression, and wrong, it is a perversion of their main purpose to set up one class of laws above another. All laws are meant alike to secure to each individual the fruit of whatever good and honest impulse he can derive from sources above and beyond them, in order to further his pursuits in life. Whether laws are more or less concerned with one kind

duct illegal, and so put an end to all further applications.—*Prynne's Constit.*, vol. 3. In 1338 the German Electors in assembly resolved that the Imperial dignity was derived from God alone, and no approbation of the Holy See was required.—1 *Geffcken, Ch. & St.* 257. As COKE said, the Papal authority did never fine or imprison in any case, but ever proceeded only by ecclesiastical censures, and there could be no pretence therefore for holding, that any such jurisdiction ever took root in England —4 *Inst.* 324.

of subject or another, all are liable to be defective, and are liable to amendment. No distinction can be drawn as regards the duty and desire to make one class better adapted to their main purpose than another class.

Supposed alliance between Church and State.—Another and kindred notion embodied in the use of the words “Church and State,” is that which implies, that there is or once was a species of alliance or high contract between the representatives of one body of citizens and the representatives of all the rest, whereby stipulations and conditions were settled between them. The ecclesiastics, that is to say, those persons whose profession is to minister in sacred things, are in no way distinguished from their fellow-citizens, except only in the duties they perform for the time being. All are alike bound by the general body of laws, and are preserved by the same great machinery of a free Parliament, incorruptible judges, trial by jury, a free press, habeas corpus, and the other prominent securities of life and property and reputation. That some of the property over which ecclesiastical persons have a limited control is protected by peculiar laws, burdened by peculiar trusts, and its misapplication corrected by peculiar courts, is of no importance, seeing that these minor arrangements are often the accidents of an accident, and the inheritance of obsolete methods in the policy of our ancestors. That these ecclesiastical persons are not allowed the same latitude of speculation and the same liberty to vary the creed which the legislature has fixed for them as the essential accompaniment of their profession, is also a matter affecting only their own class. All professions and vocations are protected alike by the law, whether one may be deemed more honourable or not in itself by those who select them or those who benefit by them. Vocations being voluntary give no essential precedence one over another, all being alike subject to one paramount control, namely, that of the law, which has been accepted or declared by Parliament, and which Parliament alone can amend.

Alleged submission of clergy.—Though therefore ecclesiastical persons and their property, and rights and wrongs are all bound by the same law—though that law may vary according to the subject and be administered to some

extent by peculiar courts, there is a widespread error which now and again recurs, namely, that because a statute of 25 Hen. VIII. c. 21 recited a submission of the clergy as one of its inducing considerations, this implied, that there was some antecedent rivalry and antagonism between the clergy on the one hand and the state or Parliament on the other hand, whereby they ratified some compact, on fixed and unalterable terms, like two independent national governments; and that those terms cannot be altered except by the two parties who originally exchanged them. This view is founded on the radical error, that Parliament could or ever did at any period of history enter into a negotiation with a small class of its subject citizens on terms which could not be freely altered by Parliament afterwards on its own authority. No one class can ever be so puissant as to parley on equal terms with Parliament—for the best of all reasons, that the one is weak and helpless and the other omnipotent. It is one of the peculiar advantages of our constitution that each and every class is subject to the paramount authority of Parliament. Whatever may be the wishes of any one class which seeks advantages, or is about to be subjected to further control, the moment that Parliament has spoken and has embodied in a statute a deliverance on the matter to be dealt with, the antecedent wishes, expectations, or grievances of that class are no longer to be appealed to, except simply so far as they sometimes assist the judges who have to interpret the ambiguities of that as well as other enactments. It is by this process, that each class is subdued in detail by the superior wisdom of that all powerful Senate which cannot be controlled, and which has the power to control all the component forces of the realm. And without this theory and this practice government would be impossible. If any one class could set itself up and claim to dictate to the Parliament the conditions on which its rights, liberties, and property were to be held and enjoyed, or to dictate who were to be the judges to administer justice between man and man, or between class and class, or between the several members of any one class, Parliament would cease to be the great and irresistible power which keeps all the interests of the nation in their proper places, and to which every profession in its turn must bow submissively.

To assume that the clergy once had rights co-equal with Parliament, and settled and secured by some power before and above Parliament, and which still subsist in that body or any portion of it, or in so far as not expressly given over and parted with, is a dogma irreconcilable with every theory of government. There can be no settled government if any one portion of the people can set itself above the law and repudiate the authority of the sole organ which declares, adopts, and reforms that law. No divinity can hedge the Church, or the select number who constitute it, from the influence of one and the same all-powerful and paramount legislature.

Royal supremacy in Church affairs.—When it is said that the supremacy of the Crown in ecclesiastical matters in England is a first principle, this only means that it is nothing more than the elementary rule necessarily arising out of the very nature and constitution of all independent governments. That rule is, that if there is a sovereign, then that sovereign is the highest in authority and position, and has the same relative superiority over the ecclesiastical professions as over all the others. Yet this rule has been expanded into many words by statutes from the Constitutions of Clarendon to those of Henry VIII. and Elizabeth, as if it required to be declared in express terms. The confusion of ideas about ecclesiastical jurisdiction so long propagated by the See of Rome required frequent manifestoes and abounding repetitions in statutes and canons, so as thoroughly to root out of the minds of legislatures, judges, and subjects the current traditions of the time.¹ And even Coke and Hale think it necessary to say, that this rule, which is a maxim or truism, appears by records of unquestionable truth and authority, instead of merely stating, that it is self-evident and a necessary axiom or postulate for every government. Coke at the same time said, these acts were merely declaratory of the common law.² A statute of Henry VIII. in 1536 made it compulsory on all officers, ecclesiastical and temporal, to take an oath renouncing the jurisdiction of the

¹ Constit. Clar. (1184); 25 Ed. III. st. 6; 38 Ed. III. st. 2, c. 1; 16 Rich. II. c. 5; 24 Hen. VIII. c. 12; 25 Hen. VIII. c. 21; 1 Eliz. c. 1; 5 Eliz. c. 1; canons 1603, §§ 1, 2, 26, 37. ² 1 Hale, 75; Caudrey's Case, 5 Coke, 1.

See of Rome.¹ So important was the truism deemed, that under Elizabeth any person who controverted it, either by advisedly preaching, or writing, or speaking to the contrary, was declared to be liable to forfeiture of goods.² And it was punishable by præmunire to refuse to take the oath of supremacy.³ And the canons of 1603 treated the denial of the supremacy as a ground of excommunication. This supremacy of the Crown has never been defined by any statute or common law;⁴ but it is

¹ 28 Hen. VIII. c. 10, § 6.

² 1 Eliz. c. 1. A statute of Henry VIII., one of a series, in its recital sufficiently well expressed and recognised this fundamental law: "This, your Grace's realm, recognising no superior under God, but only your Grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and ordained within this realm for the wealth of the same, or to such other as by sufferance of your Grace and your progenitors the people of this your realm have taken at their free liberty, by their own consent, to be used amongst them, and have bound themselves by long use and custom to the observance of the same, not as to the observance of the laws of any foreign prince, potentate, or prelate, but as to the customed and ancient laws of this realm originally established as laws of the same by the said sufferance, consents, and custom, and none otherwise."—25 Hen. VIII. c. 21. The statute of 1340 had substantially expressed the same cardinal rule of jurisdiction.—14 Ed. III. st. 3. And COKE said it was settled by judges in the time of Edward III., that the Pope's excommunication could not prejudice any man in England.—*Caudrey's Case*, 5 Co. 1. BODIN, in France, under Henry IV., insisted on the doctrine that civil sovereignty was absolute. And GROTIUS, in 1613, contended that the Church had nothing but a persuasive authority.—2 *Hall. Lit.* 341 (ed. 1873.) By many the oath of supremacy was understood as merely negating that of the Pope.—1 *Hallam, Const. H.* c. 3. "The Royal supremacy represents the same authority, and no more, in matters ecclesiastical, defined and limited by the ecclesiastical law, as it does in matters temporal, defined and limited by the municipal law."—Per *Alderson, B., Memoirs*, 225.

³ 5 Eliz. c. 1.

⁴ When the bill for supremacy was in the House of Lords, in 1558, the ex-Chancellor Heath opposed it on the ground that the Pope's supremacy had been already acknowledged by all the bishops at four general councils. Moreover, the canonical laws of Christ's Church, to which they had been sworn at the font, were binding on them all, and by leaping out of Peter's ship they would hazard themselves to be overwhelmed in the waves of schism, of sects, and divisions. He also relied much on the disqualification of a woman to be "supreme head." The arguments were all more or less scriptural quotations and adaptations of vague expressions. He

obviously a word used merely as correlative to the law of the land, denoting that kind of tutelary supervision which is recognised in the coronation oath.¹ In one respect indeed a statute was passed to declare, that the power of dispensing with statutes was no part of that complement of rights vested in the sovereign, and known under the title of this supremacy, though it had long been mistaken to be one of its chief ingredients.² All statutes which imposed a penalty for holding any doctrine like that aimed at by the oath of supremacy were repealed in 1846, except as regards clergymen.³ The oath of allegiance and supremacy was re-written by the legislature in 1858;⁴ but all express mention of supremacy was dropped in 1868, and a general expression of allegiance was all that was deemed sufficient.⁵ In effect the supremacy of the Crown in all civil and ecclesiastical affairs is an elementary principle which does not require to be explained, but is merely assumed as an axiom under every kind of kingly government.

Meaning of the words "Church" and "Protestant Episcopal Church."—The word Church is used in two leading senses. In its most usual sense it includes all those who pursue as a profession the performance of various duties incidental to public worship as established by law, and it also includes that portion of the public who join in and profess the doctrines embodied in that mode of public worship. The other sense confines the word to those who are thus professionally engaged, without including the laity

assumed throughout the unity of Christ's Church. — 1 *Somers' Tracts*, 78.

¹ 1 Will. & M. c. 6; 6 Anne, c. 8. The coronation oath has sometimes been used as an argument against changes in the law relating to the Church. It was well agreed at the settling of the oath in 1689, that the words "Protestant Religion established by law" meant the same thing as "which is, or may be, established from time to time;" and no assurance exacted from a sovereign by the estates of the kingdom can bind him to refuse compliance with what may at a future time be the wish of those estates.—*Macaulay, Hist.* c. 11. The argument which sets up the Coronation Oath as an obstacle to changes in ecclesiastical laws was wholly repudiated by Lord Liverpool and by Canning.—16 *Parl. Deb.* (2) 1003; see also 197 *Parl. Deb.* (3) 82.

² 1 Will. & M. sess. 2, c. 2. ³ 9 & 10 Vic. c. 59. ⁴ 21 & 22 Vic. c. 48, § 1 (repealed). ⁵ 31 & 32 Vic. c. 72.

for whose advantage they minister. A still wider sense, however, is sometimes given to the word "Church" when it denotes all those who agree more or less closely in the leading doctrines which Protestant Christians, including Dissenters as well as Churchmen, maintain; and as such doctrines are common to Christians in some other countries, such a signification embraces members in all parts of the world. And there are various still wider and looser meanings attached to the same word, and which are rather figurative than literal. The Church of England is that body of clerical and lay members who differ from other Protestants in England and elsewhere in some leading ceremonies and their scheme of internal government; but differ most of all in this one characteristic, that the clerical members are not allowed to deviate from certain standards of doctrine and ritual which have been stereotyped by being incorporated into statutes. Another characteristic is, that the property in which they are interested is restricted in its use by like enactments, which can only be varied by Parliament and by no other power or authority. But in so far as the clergy keep within these statutory restrictions they enjoy freedom of opinion. The Church of England and Dissenters of any one sect agree in this, that neither constitutes a corporation, though they are usually spoken of as if all the men and women holding similar doctrines and practising similar rites and ceremonies of public worship must figuratively resemble a corporation. What actually exists is, that in each parish of the Church of England the parson is in possession of the church and glebe and parsonage-house and tithes, and he exercises his profession there for the time being as the representative owner or freeholder, who is capable by law of protecting that portion of property, and to that extent he is a corporation sole. Yet the parson as such a proprietor is as independent of all other parsons as if they had no connection of any kind. Each is a unit, and the Church is merely the aggregate of these units. A bishop is also a corporation sole, having a like limited use of property for the purposes of his office; and there are other ecclesiastical persons, as deans, canons, archdeacons, on a similar footing, and each of whom has certain rights of property attached to his office. The leading characteristic of each of these persons as far

as regards holding of property is this, that each has at most but a limited control over it, and can neither sell nor alienate nor burden it like an ordinary proprietor. Thus it is that the Church of England as a Church has no property, and has neither rights nor wrongs; but individual members of that Church singly, and in a few cases jointly, have a limited possession of property, and in the eye of the law alone enjoy, and defend such enjoyment to the greatest extent to which any one individual is allowed to enjoy it. And in order to regulate more thoroughly the uses of this kind of property the estates of all archbishops and bishops and most of the cathedral and collegiate deans and chapters, limited as these were, have been transferred to Ecclesiastical Commissioners, who allow to each an income in lieu of what he formerly enjoyed.

The name of Protestant originated with the sixteenth century, and was used to denote those Lutherans who in the Protestation of Spire protested against and renounced the doctrines of the Mass, which the Romish Church had held prior to that period, though afterwards deemed no longer tenable in England. The same name has been absorbed into the constitution of this kingdom, and denotes some leading doctrines, especially when used in connection with the succession to and the duties of the Crown. The "Protestant reformed religion established by law" was the description used in the settlement of the coronation oath at the Revolution.¹ It is, however, usually called by the more familiar name of "the Church of England as by law established," and in older statutes it was even called the Holy Church of England.²

Doctrines of the Church how far protected by law.—From this outline it will be manifest, that the law does not and cannot concern itself with a great variety of the doctrines which members of the Church of England like other churches from time to time maintain; and to which they often attribute great importance. These are things that affect merely the conscience of individuals, and cannot be made matter of compulsion. The law is nothing except it can restrain the conduct of men with effect, and as many of the doctrines of religion are too subtle to be restrained or controlled by

¹ 1 Will. & M. c. 6.

² 25 Ed. III. st. 4.

the only weapons which the law can wield, namely, the punishment of the body and the deprivation of property, it is idle to suppose that matters of mere belief can be deemed of intrinsic importance by the law. It is true that statutes have laid down some broad outlines of doctrines, and have incorporated a code of ritual more or less detailed for members of the Church, and these are not allowed to be varied; and in case of disputes courts must interpret the meaning of these written documents in order to settle such disputes. But except for the purpose of solving difficulties between members of the Church, whether clerical or lay, and which the law is bound to solve for the same reason that it solves all other difficulties between man and man, the worth or truth of any religious doctrine is deemed by the law of no intrinsic importance. Whenever a matter of that kind enters into a judgment of any of the courts it is merely because it is an essential part of the litigation that has arisen on each particular occasion, and not because it is any business of the law either to dictate or to enforce the holding of any particular doctrine on any subject, human or divine.¹ The purposes of the law can be fulfilled without any such interference with private opinion. It is enough for any court that Parliament has selected a creed and a ritual as the best for the time being for such of its subjects who choose to accept them, and the law will content itself with enforcing these, so far as they can be enforced; but it does nothing more.

Alleged divine origin of canon law.—Controversies without end have divided Christian writers as to the manner and form in which, in the early centuries of the Church, priests came to be treated as of different grades, and certain stages of qualification or appointment came to be viewed as essential to the government of a religious community. All such theories, investigations, and arguments, may safely be left to ecclesiastics. All seem to assume as a first principle, that whatever existed in those first centuries must necessarily have been divinely appointed models for all future time; and perhaps it is not to be wondered, that the same views as to the origin of what is called ecclesiastical law prevailed as we have seen pervading ancient times and the

¹ It is said, that it was first laid down in 1588 by Bancroft in a sermon, that episcopacy was a divine right.—1 *Neal's Pur.* 395.

early centuries as to the origin of secular laws, namely, that these laws were also divinely appointed, and therefore it must be impious to amend them.¹ The law after long experience has step by step retreated from this untenable position, and now no court professes to act on any such assumption. Nearly every chapter and verse of that law has at times been re-written according as experience dictates, or a keener sense of equality and justice defines and gives precision to first principles. All that once floated as maxims vague and indefinite must yield to the lessons of experience, and no distinction can be drawn between the different portions of the same whole. Whatever law exists and whencesoever derived, if it is such as is fit to be enforced between man and man, then it must necessarily be capable of being re-written and amended, whenever the legislature of the day finds the circumstances call for it—and for this obvious reason, that experience teaches men and nations alike wisdom, and nothing that man does or is acquainted with reaches the standard of perfection which every one carries about with him in his own secret heart.² The sources of the ecclesiastical law lie in that body of doctrines in which Christian communities had generally agreed before the Reformation, and hence much looseness prevails in each of its departments. Many of these canons had been absorbed into our common law. It was of no consequence where a good rule was first found, or how it originated, if it met a want and was accepted and acted upon in our courts. Such acceptance and daily use have here and there converted many a doctrine of foreign law into part and parcel of our own law as effectually as if the whole power of Parliament were expended in the work of its appropriation and transformation.

Meetings of clergy in councils and convocations.—That the bishops and persons in authority in the early Christian Church should meet and confer on the matters that interested them is natural and was inevitable. Ecclesiastical writers have remarked, that the Church in

¹ See 1 Pat. Com. (Pers.) 108.

² “Neither God’s being the author of laws for the government of His Church, nor His committing them unto Scripture, is any reason sufficient wherefore all churches should for ever be bound to keep them without change.”—1 Hook. Eccl. Pol. 238.

England regularly held annual synods till after the Conquest, and provincial councils continued annually till the fourteenth century, their object being to correct excesses and reform manners; and convocation then superseded these provincial councils and sat always when Parliament sat, and often when Parliament did not sit.¹ And such writers trace the existence of diocesan synods soon after the apostolic age, and thence they soon became provincial synods or councils.² The first council held in England was that of Verulam (now St. Alban's) in 446, to check the errors of Pelagianism.³ The papal legates in the time of Henry I. obtained a footing, and so introduced foreign interference in ecclesiastical synods and appointments of bishops,⁴ and this more or less continued till the time of the Reformation.⁵ In the thirteenth century the bishops sometimes drew up constitutions for their own dioceses; there were also provincial constitutions made by the two archbishops.⁶ Of these last, fourteen, extending from 1206 to 1443, were collected by Lyndwood. About the time of Wicliff the convocation met in much tribulation at the ferment of new opinions, and assumed to deal with heretics. Another great topic afterwards submitted to it was the divorce of Henry VIII. and Queen Catherine; and the next was the submission of the clergy and the statute of 1532 which ratified it. The Six Articles were framed in 1539 by the convocation of that day with a view to check the Reformation, and those adverse to all reform thereby committed Parliament to the doctrine of transubstantiation and the celibacy of the clergy. In 1603 Convocation collected the canons which are still in force, being made with the king's licence and thereafter ratified; and several of these will be afterwards noticed in their proper place.⁷

¹ Atterbury, Convoc. 385; Pusey on Suprem. 113. ² Kennet, Synods, 198. ³ Hody, Eng. Counc. 14. ⁴ 2 Inett, 163.

⁵ 2 Spelman, 123. ⁶ Lathbury, Convoc. 73.

⁷ The convocation, according to some, originated in 1295 with the writ of Edward I., who called together the clergy to give him counsel and help, and aid him by self-taxation of their benefices. This was the first national assembly to which the lower clergy were called by the king's writ. What the king asked was half a year's profits. In 1665 the Archbishop and Lord Chancellor agreed, that in future the clergy would yield up what right they had of giving subsidies to

Power of convocation as to canons.—The convocation from the first assumed, as was natural, the power of making canons which would bind not only the clergy but all the public, the early notions of ecclesiastical jurisdiction being boundless, and such niceties as the moderns discover never occurring as practical difficulties to any of its members. But as civilisation advances, and a free press develops powers and forces which synods and bishops cannot seriously control, doubts have long surrounded the position of convocation as a source of ecclesiastical legislation, more especially in its relations to Parliament and the Crown. Some have held, that before the time of Henry VIII. the convocation could make canons and enforce them freely without any consent of the Crown. The first clause of Magna Charta declared, that the Church of England shall be free, and shall have all her liberties—which, Coke says, meant, that ecclesiastical persons should be freed from encroachments and usurpation, such as purveyance, tolls and customs, compulsory service of temporal offices, and as soldiers.¹ Others have said that this meant freedom from all papal interference.² While it has again been said, that it meant freedom to elect bishops and hold synods, to reform the liturgy, and act without interference from the secular courts. At first great looseness prevailed in distinguishing one jurisdiction from another. But the statutes of Provisors and of Præmunire tended to clear up the subject.³ It was held in the time of Henry VII., that a suit

the State by their own votes, and would submit to be taxed by the House of Commons.—5 *Burnet, Own Time*, 37. And a statute of 1665 for the first time taxed both clergy and laity alike. In 1700 the Lower House of Convocation refused to be dissolved by the archbishop, and claimed to sit till they were prorogued by their own prolocutor. They set about censuring books as of dangerous consequence. The Upper House denied the power of the Lower House to censure any book. The disputes lasted five years, and the Convocation was dissolved in 1702.—1 *Calamy's Abr.* 554-618. In 1717, on the occasion of Bishop Hoadley preaching a sermon which a committee was appointed to inquire into, the convocation was prorogued for six months, and had not been since summoned till a very recent date.—2 *Hallam, C. Hist.* 395. WARBURTON said "their assumed right to censure books would do no good, and that when convocation gave up the old right of taxing themselves, they gave up the right of meeting and debating."

¹ 2 Inst. 3.² Barringt. stat. 6.³ 25 Ed. III. stat. 6.

in the Ecclesiastical Court for a temporal cause was a ground of *præmunire*, as for example, to sue there for a debt or for forgery of a will.¹ And the fact, that the root of ecclesiastical jurisdiction is in the Crown makes no difference in that respect.² The statute, 25 Henry VIII. c. 19, at last enacted, that no canons should thereafter be promulgated or enforced by convocation unless the king's writ had been first issued to hold the convocation, and also his licence to make and enforce the particular canons, and that until a revision of the existing canons and constitutions these should, if not repugnant to the law, remain in force till the commissioners should revise them. Coke said this statute was little more than an affirmation of the previous law.³ By this act of submission, which put an end to any kind of legislation by convocation without the king's licence, the existing canon law was to be reviewed by a commission of thirty-two persons, half lay and half clerical.⁴ The commission of Henry VIII., however, never completed their revision so as to receive the king's assent. And though a like commission was revived by Edward VI. and drew up a *reformatio legum*, that also never received the royal assent.⁵ The judges were said in the time of James I. to have met and held, that the king may without Parliament make ordinances and institutions for the government of the clergy, and may deprive them if they do not obey.⁶ But this was an extrajudicial opinion, and it was elsewhere laid down two years later, that the king could not change the ecclesiastical law.⁷ The convocation in the time of James I., however, again met and revised canons, which in 1603 received the royal assent. These canons of 1603 without doubt bound the clergy, and the Uniformity Act, 14 Charles II. c. 4, did not repeal them. It merely did not affirm them; yet every clergyman is bound by his oath to obey the canons.⁸ And Lord Hardwicke assumed that the canons of 1603 did bind the clergy.⁹ And Holt, C. J., expressly held, that a clergyman could be deprived for disobeying a canon which had been made by convocation.¹⁰ The ecclesiastical judges have long been inclined

¹ 3 Inst. 120. ² Ibid. ³ 12 Rep. 72. ⁴ 25 Hen. VIII. c. 19. ⁵ 2 Burnet, 197; Collier, 326. ⁶ Moor, 755. ⁷ 12 Rep. 19. ⁸ 28 Parl. Hist. 130. ⁹ Middleton v Croft, 2 Atk. 650. ¹⁰ St. David's v Lucy, L. Raym. 449; Carth. 485. In 1640 the

to treat the collection of provincial constitutions collected by Lyndwood as if it had been enacted by Parliament. Those canons are avowedly collected not only from our provincial constitutions and canons, but from the writings of eminent persons without much nicety of definition.¹ And Hale said that there was no great harm in admitting the customs of ecclesiastical persons, for they might well be treated as of equal weight with other customs or usages.²

Power of convocation to make new canons.—That the bishop should occasionally call his clergy together to consult about their common interests and duties was natural, and that an archbishop should call his bishops together with some of the clergy was equally natural, and required no authority or precedent to establish the fact, any more than that the members of any other profession should so meet for like objects of their own. But what they could do when thus meeting has probably not been accurately appreciated. The canons which they made might, in the eye of the law, be nothing more than the resolutions and opinions then current, and containing views and practices which were thought to be the best. And as all the clergy were bound, and still are bound, to obey the bishops, at least within certain narrow limits, and none could be instituted into the benefices of the Church without promising such an obedience, and being subject to deprivation and other punishments for disobedience, canons seem one mode of influencing the clergy. Nevertheless, as the Statute of Uniformity fixed the range of canons and all other restrictions on the clergy, no power but Parliament can now effectually alter the situation even of the clergy. And beyond the clergy the canons could have no legal effect, for no legislative power ever belonged at any time to the convocation merely as such. It was neither a court nor a corporation. It is true, the common law absorbed from

convocation enacted canons and exasperated the public, imposing on the clergy the *et cetera* oath so as to bind them to make no alteration in the government of the Church by bishops, deans, archdeacons, &c.—2 *Hallam, Const. H.*, c. 9. In 1694 the convocation made a claim to meet when Parliament met, without any royal licence, and this view gave rise to controversies not yet ended.—*Lathbury, Convoc.* 343.

¹ *Kemp v Wickes*, 3 Phillim. 276. ² *Hale, MSS.*, Middleton v Crofts, 2 Atk. 669; Per *Tindal, C. J.*, *R. v Millis*, 10 Cl. & F. 678.

time to time, some of the canons, not only of convocation but of the general councils of foreign churches. These, however, became part of our law, solely by virtue of their being so appropriated, acted upon, and enforced, either by the temporal courts or by the ordinary ecclesiastical courts which were equally part of the law of the land. Jurisdiction, in ancient times, was subdivided, and the temporal courts disposed of the great mass of litigation, while the ecclesiastical courts also had a large share which was once conceded to them, though it has been since greatly reduced. But whether the temporal or the spiritual court adopted and enforced any particular canon, it was this very circumstance, that it was so adopted and acted on, which gave to such a canon all its force. The convocation had no inherent power of its own to make any canon or bye-law which could bind others than the clergy. And even the power to make canons with this limited authority began to be found capable of abuse and to lead to confusion. And the statute of Henry VIII., as we have seen, took away altogether the power of convocation to enact and enforce canons, constitutions, or ordinances, by whatever name they should be called, or even to meet as a convocation without the king's writ authorising them to meet, and the king's licence specially authorising them to make and execute canons. The king's special authority impliedly prescribed the subjects on which canons could alone thenceforth be lawfully made. Ever since then Parliament has intervened and can alone alter the liturgy and laws of the Church. Thus, even so far as the binding force of new canons could touch the clergy, the king's licence was necessary thenceforth. But even with the king's licence it did not follow, that the clergy either in a convocation or under any other name, could alter the ceremonies, or rights and duties of the other clergy. As these were all defined by the Statute of Uniformity so far as Parliament thought fit to define them, the Parliament which fixed them can alone now alter them. Though the convocation used to meet with the same regularity as Parliament and was a convenient mode by which the clergy imposed a tax upon themselves so as to be on the same footing with the laity, this practice was discontinued after 1665¹ as inconveniently keeping up a distinction

¹ 4 Burnet's Own Times, 508.

between the clerical and lay professions which never could be justified. As the clergy are protected by the same laws as the laity, no reason could be rendered for singling out them and their property as objects for a separate process of assessment.¹

Convocation as a means of checking heresy.—The other ground on which Convocation has been viewed is the part it fulfils in the constitution as dealing with heresy. Sir B. Shower, or the author of *The Letter to a Convocation Man*, said that Convocation was needed to give a check to the further proceeding of loose and pernicious opinions and to remove scandals; and that Convocation was an ecclesiastical court as essential to our constitution as any other law, and the king had no right to withhold his summons calling upon it to meet with the same regularity as Parliament. And it has been urged that Convocation is still, or ought to be, notwithstanding the statutes, the supreme ecclesiastical court in matters of doctrine.² It has been urged that the convocation at most only conceded to Henry VIII. and Elizabeth so much of the prerogative of the Crown as had been arrogated by the Pope, but that it did not concede the right of the Church to hold general councils for the reformation of the Church and for the determination of matters of faith, and though Convocation agreed to sit only with permission of the Crown and not to enforce its canons without the Crown's consent, this did not imply that the power came from the Crown any more than that Parliament itself derived its motive power from the same source.³ But whatever may have been deemed to be the powers of Convocation in ancient times, it cannot be doubted that Parliament has now the inherent power to alter any canons of the clergy without consulting

¹ Edw. I. had summoned the clergy along with the laity to the national assembly in 1296. 2 *Wilk. Conc.* 240; 2 *Spelm.* 428. The clergy had taxed themselves separately from the time of Edw. I. till 1666.—3 *Stubbs's Const. H.* 340. The Crown however has in modern times issued a writ to Convocation to meet and alter the subscription canons and the canon about sponsors; and two canons on these subjects have been substituted for the old. And on the advice of Convocation, Parliament has sanctioned a new lectionary.—2 *Phillimore's Eccl. Law*, 1936.

² Joyce, *Civil Power in Church*.
5 Gladstone's *Glean.* 194.

³ Pusey, *Suprem.* 163;

Convocation. The paramount jurisdiction of Parliament to alter any law binding any class of the community is an elementary principle, and if it has power to alter the Acts of Uniformity and all other statutes, it must have the lesser power of altering and abolishing or re-writing the canons on each and every subject. And to assume that any class or profession can bargain and parley on equal terms with the legislature is to set up an *imperium in imperio* fatal to every theory of government.¹

General control of Church property and the Ecclesiastical Commissioners.—As already explained, the Church not being in any legal sense a corporation, when the property of the church is spoken of, this only means the property vested for the time being in each parson, bishop, dean, canon, and archdeacon severally, each being a corporation sole and each being independent of all the others. But the amount of property in the aggregate of all these

¹ See *ante*, p. 373. From time to time the subject has been discussed in Parliament, and it has been there contended that Convocation is not the established mode of promulgating the doctrines and governing the Church of England; and that as Parliament first selected as much of its practices and doctrines as could with propriety be recognised and endowed with the certainty required by the law, so it must rest with another Parliament to alter what has been done by a preceding Parliament.—118 *Parl. Deb.* (3) 559. The consent of the Convocation to the alteration of canons is not necessary.—*Per L. Cranworth*, 188 *Parl. Deb.* (3) 1176. There were fifteen Acts between Henry VIII. and the Act of Uniformity of Charles II., and in none of them was any trace of Convocation being consulted except as to doctrine, worship, constitutions, and canons; and the law generally had been treated as proper for Parliament alone.—*Per L. Selborne*, 219 *Parl. Deb.* (3) 950.

In 1710 the majority of the judges of the time were of opinion that at common law an appeal lay from all ecclesiastical courts to the Crown by virtue of the supremacy, and that nothing but an Act of Parliament could take away such jurisdiction, and none such had done so up to that time; and, moreover, that Convocation had jurisdiction to condemn false doctrines and also punish for heresy.—*Whiston's Case*, 6 *Burnet's Hist.* 56; 15 *St. Tr.* 715. BURNET, however, says that there were so many doubts as to how to proceed in matters of heresy, that Queen Anne was advised not to allow Convocation to go further, and she prorogued it.

The canons trenched on the common law by assigning penalties and forfeitures to immoral offences. But others have said that "the great sin of the Protestant legislation was the extension of the penalties of heresy to the wilful denial of any part of the authorised articles of faith."—1 *Hallam, C. Hist.* c. 2.

units is great, and the clergy from an early period attracted the gifts of the faithful. When Constantine began to establish Christianity he empowered the clergy to receive bequests and hold land, and the fashion of gifts to sacred uses arose, which in turn made the bishops ashamed of the apparent avarice of their class and made them rebuke the legacy-hunting thereby induced. Heathen temples and their spoils often fell in as honourable prizes. And enactments were made restraining alienation to other than sacred uses.¹ Coke said that in the reign of Edward I. about one-third of the possessions of the realm belonged to the clergy.² And Hallam thought it must have been one-half.³ In 1403 the Commons suggested to Henry IV. as a means of obtaining supplies that he might seize on the revenues of the clergy, who at that time possessed a third part of the riches of the realm. But the king, seeing the impression made on the peers, said he would sooner have his head cut off than that the church should be deprived of the least right pertaining to it.⁴ Henry VIII., however, deprived the church of one-third of her resources and threw out of Parliament two-thirds of the spiritual baronage.⁵ The nature and extent of the property and the limitations affecting its use in the hands of each corporation sole will be best understood, when the details are stated more particularly in a subsequent page. In modern times some method has been introduced into the management of so many independent parcels of property. A new corporation called the Ecclesiastical Commissioners was created in 1836.⁶ The main object was to make better provision for the cure of souls in parishes where such assistance is most required. They have ample powers to augment livings, unite and exchange benefices, and the property of many of the corporations sole have been transferred to and vested in these Commissioners, who in return pay over certain fixed revenues to the former holders.⁷

¹ Conc. Carth. iii. 40; Antioch. 24; Cod. Theod. de Episc. t. 33.

² 2 Inst. 581. ³ 2 Hallam, Mid. Ag. c. 7. ⁴ 1 Parl. Hist. 294. ⁵ 3 Stubbs, 503. ⁶ 6 & 7 Will. IV. c. 77; 3 & 4 Vic. c. 113.

⁷ The value of the property so held by the Commissioners and administered was in 1842 (14 & 15 Vic.) 35,000,000*l.*, and the rental was in 1875, 733,425*l.*

CHAPTER III.

PARISHES, BENEFICES, ADVOWSONS, AND SIMONY.

Origin of parishes.—The present ecclesiastical division of England into parishes, each having a parson, rector, or vicar as the representative of the freehold of the parish church and glebe and tithes, was unknown in the earlier centuries of the Christian era. Some have maintained that there were no churches, that is to say, places set apart for public worship, during the first three centuries; but it scarcely requires learning to divine, that any number of persons joining for objects of public worship must have very early seen the necessity for them.¹ Constantine soon began to erect churches and beautify them.² And the learned have not failed to notice, that the early churches were nearly all built with their altars towards the east. Anciently the revenue of the whole diocese was in the hands of the bishop, who divided it among the clergy; and this was almost a necessary arrangement, as the thought had not occurred of attaching a priest to one fixed spot or church. And it is said that Marcian in 460 first ordered the present plan to be carried out, and each church to have its own priest.³ The canon of the 1st Council of Bracara forbade the bishops to take any share in the oblations of the parochial church.⁴ But in England the bishops are supposed to have continued much later to share in these funds.⁵ In England the bishop and clergy lived in common till about the year 700.⁶ And

¹ Bing. Chr. Ant. b. viii. c. 1. ² Euseb. Vit. Const. b. iii. c. 50.

³ Theod. Lect. b. i. p. 553. ⁴ Conc. Brac. I. c. 25. ⁵ Bing. Chr. Ant. b. ix. c. 8.

⁶ Bed. Hist. b. v. c. 27.

parishes began to be settled about the same time.¹ The origin of parish churches increased gradually here and there, sometimes anticipated and assisted by the piety of the lords of manors and great proprietors making gifts of land and houses in order to facilitate the local establishment. And the feudal notions then pervading society were easily adapted into the ecclesiastical system by making each parish priest the delegate and dependant of the bishop. The lords of manors were in many cases the founders of the parish church, and hence it is, that the parish has often the same boundaries as the manor. At all events, any local division of that land would necessarily follow the manor. The exact boundaries of parishes were, moreover, kept in constant remembrance by an annual custom of perambulations or beating the bounds. The older practice was to have a procession of parishioners singing the litany. The Injunctions of Elizabeth directed the curate and the substantial men of the parish to join in this walk.² And it is reported, that the women said amen to the curses.³

Origin of advowsons, or right of presentation to benefices.—An advowson is in its origin the right of the advocatus or patron—who is so called because he nominates a priest who shall be seised of the church.⁴ This right of nomination was implied in each founder or benefactor, and was probably the inducing motive in early times of much of this kind of bounty. When parish churches began to be built, and donors provided the means, it was but natural, or at least usual, and also politic, for the bishop to allow the patron the right of nominating the clerk who was to officiate, and the canon law had in the earliest times recognised this as a kind of common law right.⁵ And Theodore, seventh Archbishop of Canterbury, encouraged the building of churches by vesting their patronage in the founder and his heirs.⁶ An

¹ Bing. Chr. Ant. b. ix. c. 8.

² A.D. 1559.

³ Strypes' Parker, 153. It is said Sir T. Cromwell instituted parish registers.—*Tytler's Hen. VIII.* (2 ed.) 426. The smallest parish in England, St. Christopher-le-Stock, consists of one house, and is now part of the Bank of England.

⁴ Co. Litt. 17 b.

⁵ Decret. c. 4, § 24; Justin., Novell. 57, 123.

⁶ The word advowson is said to be a corruption of the words *advocat se*, as if the patron called himself in his own right to the

advowson is distinguished according to the stages following the act of nomination. Where the patron presents his nominee to the bishop for induction, it is called an advowson presentative. Where the bishop is patron, and himself inducts, it is called advowson collative. Where the patron names to a donative, it is an advowson donative. And where the patronage resides in a chapter or other corporation, it is called an advowson elective.¹ And so far as the advowson is connected with the lands of the patron, it is an advowson appendant or in gross; the former being added to lands, the latter being severed and held separately from any lands of such patron.

Advowson as an appurtenant to land.—As lords of manors were the usual founders, the advowson appendant passed with the manor as an appurtenance or incident, if no special mention was made of such advowson in the conveyance.² Being itself an incorporeal hereditament, it could only pass as being annexed to a corporeal hereditament.³ And though the word “land” will not include an advowson, if it is not appurtenant, yet it will pass under the word hereditament, or the word church.⁴ Nor will an advowson pass under such words as profits or emoluments, for the theory has always been, that it is in its nature a right that does not imply gain or interest.⁵ The owner of an advowson as appurtenant to lands may also sever it from the lands, in which case it is an advowson in gross. Moreover it may be severed only for a time, as during a lease for life.⁶ And when this severance takes place the advowson no longer passes as an incident of the land.⁷ The owner of a manor may also sever the advowson from all except a small portion thereof, as an acre, in which case the advowson will continue to be an appurtenance of such portion of land. But as a spiritual benefice cannot be granted for years, or at will, it will not pass with a demise of a manor.⁸

vacant benefice; it has been defined a reversionary right of presentation vested in a man and his heirs for ever.—*God. Rep.* 34; 2 *Bl. Com.* 21.

¹ *Co. Litt.* 119, 120. ² 1 *Inst.* 121. ³ *Tyrringham's Case*, 4 *Rep.* 37 a. ⁴ *Fortesc.* 351; *Co. Litt.* 17; *Cro. Eliz.* 163. ⁵ *London v Southwell*, *Hob.* 304. ⁶ *Liford's Case*, 11 *Rep.* 50; *Reynoldson v Blake*, 1 *L. Raym.* 198. ⁷ *R. v Durham*, 1 *Comyn, R.* 362.

⁸ *Com. Dig. Adv.*, c. 1. Though the rule as between subject

Alienation and sale of advowson.—Though an advowson is a right of property yet it has this peculiarity, that the law as matter of theory treats it as a right held for the good of the church, and not for the mere profit of the individual. Hence the plaintiff in a *quare impedit*, which is an action for hindering him exercising the right of patronage, was not entitled to recover damages until a statute of Edward I. expressly allowed this to be done.¹ The clergy are prohibited by statute “from buying, or for money directly or indirectly procuring or accepting the next avoidance of, or presentation to, any benefice with cure of souls, any dignity, prebend, or living ecclesiastical;” and the admission shall be void, and the Crown may present a successor.² But an ingenious mode has been discovered of defeating that statute, for if a clergyman purchase “an estate for life in the advowson,” and a vacancy occurs during such life, then he may present himself, and the bishop has no reason for refusing to examine and admit him. For the courts have said, “an estate for life” is not a next presentation nor a next avoidance, and the statute must be strictly construed.³ The statute, moreover, restrained only the clergy, but did not affect the laity, and hence purchases on their part were not prohibited by that statute, and are freely made. And the statute did not prevent a clergyman purchasing the advowson or the perpetual right of presentation as a property and an investment of his own. An advowson being an incorporeal hereditament may be dealt with like other property in most respects. It consists of two separable acts, one of nomination and the other of presentation, the former being the substantial right, and the latter being chiefly a ministerial act, and the owner may sever the one from the other

and subject is, that a grant of a manor without special mention of advowsons appendant will carry such advowsons, yet this is not the case where the king is the grantor, for in such case by statute an express mention of the advowson or something equivalent is required to pass it with the manor or land.—17 Edward II., c. 17. And yet if the Crown restores and not grants, as where it restores a bishop's temporalities, then no such special mention is required.—*Whistler's case*, 10 Co. 64.

¹ 13 Ed. I. c. 5; 1 Inst. 17 b.
Bp. Lincoln, L. R., 10 C. P. 518.

² 13 Anne, c. 11.

³ *Walsh v*

and grant the nomination to a third party.¹ Moreover the party entitled to present cannot do so before the vacancy occurs, and if another is admitted on such vacancy, the person to whom the promise or engagement was made cannot pursue any remedy, and the court said, that any custom set up of electing to a full place must be foolish.² One remarkable thing is, that an infant, however young, may nominate as well as present to an advowson, which however only means, that though the guardian may do these acts, they must be done in the name of the child. The notion was, that the guardians could not make money by the duty of presentation, and to prevent it the power was not to be trusted to them.³ Best, C. J., said this doctrine led to the ridiculous ceremony of the guardian putting the pen into the hand of the infant in his cradle, and guiding that feeble hand while it signed the presentation.⁴ When the advowson belongs to the wife, then the husband must concur with her in the presentation, and after her death he is tenant by the curtesy and so alone presents.⁵ And for a like reason, if the surviving husband die after the vacancy has occurred, the presentation will belong to his executor and not to the wife's heir. And, on the other hand, the widow's dower entitles her to the third presentation after the husband's death.⁶ If an advowson belong to one who has become bankrupt, he has the right to present, and such a right is expressly excepted out of those that pass to creditors.⁷ In the case of the lands being mortgaged to which the advowson is appurtenant, the mortgagor is, in the absence of covenant, entitled to present until there is a foreclosure, for the advowson is not deemed one of the profits of the estate.⁸

Death of owner of advowson or presentation.—The rule as to whether the right to present goes to the heir or the executor of the patron is explained in this way. When a vacancy occurs and the patron is not the bishop, the right to present is in the nature of a personal power detached from the lands or office to which it may be an accessory, and so it goes to the executor of the patron, if the latter

¹ Att.-Gen. v Stafford, 3 Vic. c. 80.

² Owen v Stainoe, Skin. 45.

³ Re Arthington, 2 Cas. Eq. 518, 575.

⁴ Fletcher v L. Sondes,

3 Bing. 584.

⁵ Co. Litt. 29 a.

⁶ Co. Litt. 34 b, 379 a.

⁷ 32 & 33 Vic. c. 71, § 15.

⁸ Mackenzie v Robinson, 3 Atk. 559.

has not yet presented.¹ And thus, while the lands descend to the heir or the office goes to a successor, the right of presentation falls to the executor of the patron. And even where the patron had nothing but a term in the right of advowson, and the term came to an end after the right accrued, but before it was exercised and the patron died, his executor would have the right to present though the term had vanished in the meantime.² This right to the vacant turn of presentation is deemed in the eye of the law to be in the same position as a chattel vested in the testator; and it was on this analogy that it was held, that when a prebendary had a right of advowson and died before he exercised it, the next turn belonged to his executor and not to the successor in the prebend.³ So an advowson may be devised with or without the power to sell the next presentation.⁴ And till the trustees sell, the *cestuisque trust* has the right of presentation.⁵ And it may be given on trust to present some fit person, such as the parishioners and inhabitants should nominate: in which case the right of election has been held in practice to belong to the majority of the inhabitants above the age of twenty-one, and paying church and poor rates.⁶ And in a case of this kind an election by ballot would not be illegal.⁷ As advowsons are on the footing of temporal inheritances and descend by course of inheritance, and can be dealt with otherwise in like manner,⁸ so they may be granted to trustees for the benefit of *cestuisque trust*. In such a case all the *cestuisque trust* must agree in the nomination.⁹ And if they cannot agree, the court has allowed them to determine by lot which of them should nominate.¹⁰ A majority

¹ *Mirehouse v Rennell*, 8 Bing. 550. ² *Ibid*.

³ *Ibid*. While right of presentation to a vacant benefice passes on the patron's death to his executor, it is otherwise as to advowsons belonging to the bishop. As to him, if he dies before presenting, the right goes not to his executor, but to the king as part of the prerogative.—*Mirehouse v Rennell*, 8 Bing. 550.

⁴ *E. Albemarle v Rogers*, 2 Ves. 477. ⁵ *Biggs v Sharp*, L. R., 20 Eq. 317. ⁶ *Fearon v Webb*, 14 Ves. 13. ⁷ *Shaw v Thompson*, 3 Ch. Div. 233. ⁸ *Doct. & Stud.* 2, c. 26.

⁹ And in the event of the trustees not presenting the person elected, there is either a remedy as for breach of trust or by way of mandamus to compel performance of a legal duty.—*R. v Orton*, 14 Q. B. 139; *R. v Kendall*, 1 Q. B. 366.

¹⁰ *Johnstone v Barber*, 6 De G. M. & G. 439.

of a corporation have been held entitled to present.¹ And in the event of an advowson becoming vested in joint tenants or tenants in common, or in trustees, unless they manage to agree within six months, the ordinary can present, for the presentation lapses.² In the case of coparceners succeeding to the advowson, the common law recognises a precedence in the elder sister to this extent, that she has the first turn, and the next turn goes to the second sister, and so on till the turn of the first sister comes round; and this order will be adhered to though one of the coparceners negligently allows usurpation.³ The turn of each is complete when the church is full, though the clerk presented may afterwards be deprived.⁴ In all such cases, however, of joint tenants, tenants in common and coparceners, they may obtain a partition, whereupon, by statute, each is seised of a turn,⁵ and so the difficulty of a plurality of holders is overcome.

Advowsons of corporations, the Crown and Papists.

—In consequence of the inconvenience of advowsons being practically vested in large bodies of ratepayers or inhabitants who derive no pecuniary advantage therefrom, and yet such a species of interest prevents useful improvements in the benefice, the legislature interfered, and authorised the sale of such advowsons, and the application of the proceeds to the erection, rebuilding, or improvement of the parsonage-house, or the augmentation of the living, or other useful purposes.⁶ The option of adopting such a resolution is given to a general meeting of all the owners.⁷ And before the date of the last statute it had been enacted that where advowsons were vested in municipal corporations or of members thereof, the legislature in 1835 took away from such corporations the option of retaining these, and authorised the advowsons to be sold at the discretion of the Ecclesiastical Commissioners, and the proceeds to

¹ *R. v Kendall*, 1 Q. B. 366.
² *Reynoldson v Blake*, 1 Raym. 197.
³ *Birch v Bp. Lichfield*, 3 B. & P. 449.

⁴ *Windsor's case*, 5 Coke 102. In some cases of coparceners not being able to agree, Lord Hardwicke allowed them to draw lots which should have the first presentation.—*Seymour v Bennet*, 2 Atk. 482.

⁵ 7 Anne, c. 18, § 2.

⁶ 19 & 20 Vic. c. 50.

⁷ *Ibid.*

be invested, and the interest applied to the borough fund.¹

One peculiarity attending the presentation to benefices is, that the king is deemed the paramount patron, and if the bishopric is vacant, or the bishop is incapacitated, his right to appoint to the benefices of the bishopric devolves on the sovereign. The maxim in law is, that the Church is not full as against the king till induction, and hence if the bishop has presented, but not inducted, the king obtains the presentation.² Moreover, when a person who is the owner of an advowson is promoted to a bishopric his right of presentation devolves on the king, though such person may have already given away the presentation to a grantee. Such a prerogative right of presentation is held not to supply but only to suspend or postpone the turn of the patron, and of all the patrons if more than one, and it does not take away the right of one and leave the rest entire. And hence the grantee above mentioned will merely have his right postponed by this one turn, and will come in after the death of the king's presentee.³

Owing to the peculiarity of Papists being owners of advowsons, elaborate precautions were devised in former times to disqualify them from presenting. And by a statute of James I. and subsequent statutes, the presentations to any living, free school, or hospital, belonging to Popish recusant convicts or their trustees, were divided between the chancellor and scholars of Oxford and Cambridge University respectively, according to the counties in which the benefices were situated.⁴ The only condition of this transfer of such gifts was, that the person presented should not already have a benefice with the cure of souls. But while the right of presentation was thus taken away from Papists, no other right of such patrons was affected, such as the right to sell or alienate for good consideration for the benefit of a Protestant.⁵ And on the view just mentioned, no Papist who is a member of a corporation having an advowson is to take part in the appoint-

¹ 5 & 6 Will. IV. c. 76, § 139; 6 & 7 Will. IV. c. 77, § 26; 1 & 2 Vic. c. 31. ² Co. Litt. 388 a. ³ Calland v Troward, 2 H. Bl. 324; 8 Bro., P. C. 71; R. v Eton College, 8 E. & B. 632.

⁴ 3 Jas. I. c. 5, § 13; 1 W. & M. c. 26, § 2; 13 Anne, c. 13, § 1; 10 Geo. IV. c. 7, §§ 15-18. ⁵ 11 Geo. II. c. 17, § 5.

ment; nor is any Papist to advise the Crown in such a matter.¹ The legislature in these statutes, however, provided only for the case of the advowson belonging to a Papist in severalty, for if he is a tenant in common with another who is not Papist, that other may exercise the right as if he alone were the owner. This was held to be the construction of the Act which did least harm to the Protestant co-patron.²

Advowsons as donatives.—Another kind of incumbency is called a donative, which differs from the others in this, that no admission, institution, or induction by the bishop is required, and the patron puts the donee in possession at once.³ The origin of such a right is said to have been this, that some lord of a manor or donor had built and endowed the chapel on condition that he should have the nomination of the priest in his own hands, as well as the exclusive property of the benefice or presentation. And a donative includes various kinds of preferment, and among others, prebends. When the donee is once in possession he is in the same position as an incumbent after induction, and cannot be dispossessed. It is, however, necessary that he be a priest in orders,⁴ and have subscribed the declaration of conformity.⁵ In case of a vacancy in this kind of advowson the bishop can compel the patron to nominate. Coke says, that the king could by founding a church exempt it from ordinary jurisdiction, and he could license a subject to found a church with the same privilege.⁶ Hence, though the bishop has jurisdiction over the donee so far as clerical discipline is concerned, yet he has no jurisdiction over the church or chapel, as for example, in regard to the regulation of seats.⁷ And yet the ordinary

¹ 10 Geo. IV. c. 7, §§ 15, 18.

² *Edwards v Bp. Exeter*, 5 Bing., N. C. 652. In 1831 there were 1,248 advowsons in the hands of archbishops and bishops; 787 in the hands of deans and chapters; 1,851 in the hands of ecclesiastical corporations sole; total, 3,886. There were also 952 in the hands of the crown; 721 in the hands of universities, colleges, &c.; 53 in the hands of municipal corporations; 5,096 in the hands of private owners.—*Martin's prop. Ch. Est.* 75. Others estimated private patrons at 8,409.—*Ibid.* p. 88.

³ *Farchild v Gayre*, Cro. Jas. 63.

⁴ 14 Ch. II. c. 4, § 10.

⁵ *Powell v Milburn*, 3 Wils. 355.

⁶ 1 Inst. 344a.

⁷ *Colefatt v Newcomb*, 2 L. Raym. 1205.

has power over the churchwardens, who are the officers not of the patron but of the parish.¹ But the Ecclesiastical Commissioners have latterly been empowered in certain ways to make schemes so as to render donatives subject to the bishop.²

Offence of Simony as to presentations.—Though the law has made an advowson a separate property in the hands of the patron, which he can sell and alienate almost at pleasure, and yet it is deemed a trust vested in him for the good of the public, it is singular that the law has made no provision for the fitness and acceptable qualities of the patentee; for as regards the laity, who form the congregation to be benefited by the efficient discharge of his duty, no attempt has ever been made to give the laity any voice whatever in the selection of their parson, nor has this view ever occurred as requiring much consideration. And yet the treatment of simony has long been a conspicuous qualification of the absolute right of sale and purchase, though it affects the relations existing between the bishop and patron and the presentee, and is not a matter in which the laity can directly or indirectly interfere.

As Simon Magus was rebuked for presuming to purchase the gift of God with money, the name of simony was given to offences of that kind, namely, the purchase of holy orders or of benefices in the church. Coke says simony is odious in the eye of the common law, and is the more so because it is ever accompanied with perjury.³ All the memorable councils of the church denounced this as a wrong thing, and various canons marked it as a heinous offence.⁴ The Council of Chalcedon, in 451, desired that if any bishop ordained or gave preferment for money, both parties should suffer loss of office. And this rule was acted on more or less ever afterwards.⁵

¹ *Castle v Richardson*, 2 Str. 715. ² 6 & 7 Will. IV. c. 77, § 10; 10 & 11 Vic. c. 98. ³ 3 Inst. 153. ⁴ A.D. 1841, *Dean of York's Case*, 27.

⁵ *Labbé*, vol. iv. p. 755; *Bing. Chr. Ant.* b. 16, c. 6. To guard against anything resembling simony, Justinian made it incumbent on the voter in church elections affirmatively to disclaim that he voted in consideration of a gift or of friendship or such like cause.—*Novell*, 123, c. 1. The early bishops were elected by the clergy and laity in the diocese; at last the king came to have the confirmation

And the same rules were adopted in the early English Church.¹ The injunctions of Edward VI. and Elizabeth, and the canon of James I., repeat the declaration, that the buying or selling of benefices or sacred functions is a detestable sin.² And an oath against simony was required by the 40th canon of 1603 as a condition preliminary to admission, which is now only superseded by a declaration to the like effect.³

Statutes prohibiting and punishing simony.—There being great looseness in the description of this offence of simony, it was found necessary in 1588 to define it more exactly by a statute, the effect of which was to make void the presentation or collation made to any ecclesiastical living for money or money's worth, directly or indirectly, or for the promise of it. The gift of the living for that one turn thereupon falls to the Crown, and the offending patron forfeits double the value of one year's profits. And the offending presentee is disabled from enjoying the same living.⁴ And to institute corruptly is also a void act.⁵ As a consequence, the patron may within six months make a fresh presentation.⁶ And so corrupt resignations, exchanges, and ordinations are equally void.⁷ One punishment is, that he who has been corruptly ordained is disqualified for seven years to hold any ecclesiastical living.⁸ In construing the statute with reference to

of the election, and this soon became equivalent to the appointment. And it was at this stage that simony grew up, seeing that corruption could not be wholly eradicated from courts. The evil was great, and was condemned in 549 by the Council of Orleans.—*Concil. Aurel. V.* (549) can. 10. The Pope, Nicholas I., in 865 tried to cure the evil by cutting off the right of suffrage from the laity. But after a long struggle between the Pope and the king, in the thirteenth century a kind of general appeal to Rome as the last resort for all Christendom was acquiesced in.—*Lea's Ch. Stud.* 151. The third council of Lateran in 1179 forbade even the gift or promise of the next presentation to an ecclesiastical benefice. And when a parent purchased a benefice for his son without the privity of the son, it was deemed as against the son a simoniacal act avoiding the living.—*Van Esp. Jur. Ecc.* p. 2, tit. 3.

¹ Ecbright Exc. A.D. 740; Lafranc's Can., A.D. 1075. ² A.D. 1547, 1559, 1603. ³ 28 & 29 Vic. c. 122, § 2; Canon 1866. ⁴ 31 Eliz. c. 6, § 4; 3 Inst. 153. ⁵ Ibid. § 5. ⁶ Ibid. § 6. ⁷ Ibid. §§ 7, 9.

⁸ Ibid. § 9. The Statute of Elizabeth was passed "to put an end to the taunts of Papists, that cobblers, tailors, tinkers, and millers, were in course of being admitted to the ministry."—1 *Parl. Hist.*

contracts made for securing ordination and benefice, it has been laid down, that it is contrary to the public policy declared by the statute for any one to make an agreement to procure holy orders, for these are presumed to be conferred solely out of regard to the candidate's fitness. And it is equally against public policy to bind one's self to solicit the benefit of patronage in consideration of money, for it is presumed that a patron looks out for the fittest person, irrespective of such conditions.¹ It was not necessary to this offence, that the patron should be privy to the corrupt contract; and hence where the father of a youth contracted with the patron's wife to give her 100*l.* if the patron presented his son to the living, this was held contrary to the statute.² And so in another case, where a friend of the presentee had given a bribe to the patron's page, this made the presentation void.³ And it was the same where two fathers came to an agreement, and one covenanted with the other to procure a presentation for his son in consideration of the other's daughter marrying him.⁴ But an exchange of livings and a mutual agreement not to insist on payment for dilapidations does not necessarily amount to simony, for in exchanges each party proposes to himself some benefit; and these were expressly allowed by the statute of Elizabeth, though productive of temporal advantages to both parties.⁵ Nor is a contract by the vendor of an advowson, who is not the incumbent, to pay interest on the purchase-money to the purchaser until a vacancy occurs deemed simoniacal.⁶

Sale of advowson or presentation while incumbent in a dying state.—The courts interpreted the statute of Elizabeth against simony to mean the corrupt obtaining or giving of the next presentation when the living was vacant or voidable.⁷ But it did not strike at a sale of the next presentation if the living was full, until a statute passed which avoided that also, if a clergyman was the purchaser, as this was deemed the height of indecency.⁸ But while a

746. This statute also was held to apply to donatives of the king's donation.—*Bawdercock v Mackallar*, *Cro. Ch.* 330.

¹ *Lord Kirkcudbright v Lady K.*, 8 *Ves.* 51. ² *Cro. Jas.* 385.

³ *R. v Trussel*, 1 *Sid.* 329.

⁴ *Byrte v Manning*, *Cro. Ch.* 425.

⁵ *Goldham v Edwards*, 16 *C. B.* 437; 17 *C. B.* 141; 18 *C. B.* 389; *Wright v Davies*, 1 *C. P. Div.* 638.

⁶ *Sweet v Meredith*, 3 *Giff.*

610. ⁷ *Grey v Arketh*, *Amb.* 268. ⁸ 12 *Anne*, c. 11.

clergyman could not buy the next presentation for himself a layman might do so.

The case then arose, whether it was lawful to sell the advowson when the incumbent was in a dying state. The courts at first held that this was simoniacal and void,¹ and continued under that impression for 241 years, till in 1829 the House of Lords reversed the train of decisions, and laid down the rule, that though the incumbent is on his death-bed to the knowledge of the vendor and purchaser of the advowson, yet if this was without the privity or without any view to the nomination of the particular clerk, the sale was unimpeachable on the ground of simony.² The court argued that every sale of an advowson must contemplate the death of the incumbent, and why should one incumbent be distinguished from another? If anything turned on the probabilities of immediate death, this was so vague a circumstance, that no evidence could establish it without great litigation; and as broad rules and tests were favoured by the law, by far the safer course was to hold, that, while the incumbent was alive, however near the point of death, the sale of the next presentation was good.³

Practice of resignation bonds.—A mode of defeating the simony statute was soon discovered, which consisted in a patron presenting *A.*, on obtaining from *A.* a bond containing a condition, that *A.* would resign after an agreed

¹ Cro. Eliz. 685. ² Fox v Bp. Chester, 6 Bing. 1.

³ The view of the courts of law was set forth as follows :—"The patronage of churches was at first yielded by the bishops to the lords of manors who founded or endowed them and annexed them to the manors in which the churches were situate. By the grant of a manor the advowson appendant to it passes to the grantee. Many of these advowsons have since been severed from the manors to which they were appendant. Although advowsons, when in gross, as those which are separated from the manors to which they belonged are called, are a species of spiritual trusts, yet they have been said by LORD KENYON and other judges to be trusts connected with interests, and they certainly do not lose the temporal character which originally belonged to them, but may be sold either in perpetuity or for the next or any number of avoidances. If it be proper to prevent the giving of money for a presentation, it seems equally proper to prevent the sale of that which gives the immediate right to present. But the courts of law have never thought that they were authorised to go this length."—*Best, C. J.*, Fox v Bp. Chester, 6 Bing. 16.

notice, or on request from the patron. It was held, however, in 1780, that by this arrangement a patron could not obtain complete command over the living and use it as an investment, for the holder of a living could not obtain it or hold it for a less term than for life. And though the courts of law long held such a bond to be valid, yet the House of Lords reversed their decision and held such a bond void.¹ And that decision settled the law, that a *general* resignation bond was void.²

The next great question which arose was, whether a similar bond of resignation to resign on request for the purpose of presenting a particular person was also void. For after the decision in 1780, the courts of law still treated bonds of resignation, which required the obligor to live personally on the benefice, and to perform all the spiritual duties till a particular person was capable of succeeding, to be valid and binding. These courts held that the objection to general resignation bonds was, that they enhanced the value of the living to the patron, and enabled him to sell with the means of procuring an immediate vacancy. But that view, it was said, did not apply to a *special* resignation bond, which did not give any benefit to the patron; except remotely by providing for a son or brother. When a case occurred in 1826, and the law was reviewed, a majority of the consulted judges then advised the House that special resignation bonds were as illegal as general resignation bonds. The House of Lords accordingly held that these bonds were void, for, as Lord Eldon, L. C., said, even after resignation there was no law on earth which could compel the patron to present the particular person designated in the bond. Therefore the one kind of bond was as contrary to public policy as the other.³ But as the law

¹ Bp. London *v* Fytche, 1 Bro. P. C. 96.

² In this case the House of Lords consulted eight common law judges, and seven held the bond was valid and one held it invalid. LORD THURLOW said he considered the patron as only a trustee for the public to dispose of the living; and the bishops helped Lord Thurlow to reverse the decision of the two courts below. The vote for reversing was 19 to 18, the majority including all the bishops present.—23 *Parl. Hist.* 878.

³ Fletcher *v* L. Sondes, 3 Bing. 503. BEST, C. J., in 1826 defended the validity of these special resignation bonds at common law, as he said all the judges before him had done for 200 years,

had been deemed to be otherwise, and many had offended, an Act of Parliament was passed in 1829 for the express purpose of mitigating its severity and allowing these special resignation bonds to be valid in a few cases. Accordingly such bonds were declared to be, and they are now legal and binding, if made in order that the patron's uncle, son, grandson, brother, nephew, or grand-nephew (whether the relationship be by blood or marriage) shall be presented to the living.¹ But this further condition is imposed, that part at least of the writing is to be registered within two months after its date, with the registrar of the diocese or jurisdiction, and it is to be open to public inspection on payment of a small fee.² The bishop cannot then refuse to accept the resignation when tendered.³

Remedy in case of simony.—Though a simoniacal presentation was contrary to law, yet it was deemed only voidable by deprivation, until a statute of Elizabeth made it utterly void.⁴ When a layman has taken part in it, the remedy is an action for penalties under that statute.⁵ And when the patron has made a corrupt presentation, the right to present devolves on the Crown.⁶ It is for the Ecclesiastical Court to entertain direct proceedings for the punishment of simony; that is to say, the presentee or ecclesiastical person can be proceeded against as for a criminal offence.⁷ And this is by virtue of the canon law, which

thus: "To hold these bonds void will cause owners of manors with advowsons annexed to sell the advowsons and break the connection between the landed interest and the clergy. The young men of family are from their education and habits likely to make the best parish priests. From their connections with the owners of lands in the parishes, all the inhabitants feel a respect for them which must add much to the effect of the instruction they give. Connection with proprietors of the soil gives to the clergyman the greatest interest in the happiness of his parishioners, and stimulates him to promote their spiritual welfare. Such persons will not take orders when the livings which their ancestors founded are severed from their families. I am aware these are rather considerations of policy than law."—*Fletcher v L. Sondes*, 3 *Bing.* 590.

¹ 9 Geo. IV. c. 94. ² *Ibid.* ³ *Ibid.* § 5. ⁴ 31 Eliz. c. 6.

⁵ *Ibid.* ⁶ 3 Inst. 153.

⁷ *Whish v Hesse*, 3 Hagg. 693. SIR J. NICHOLS said there was no instance before or since the statute of Elizabeth of a proceeding against a person as *simoniacè promotus* without his being privy to the simony.

makes simony an offence.¹ But though an ecclesiastical person simoniacally inducted may be proceeded against at once, it was enacted in 1688 that, if the offence be not discovered and punished in his lifetime, it would be too late to proceed after his death, and innocent successors were not to be disturbed and displaced on such an account.² And though a layman may legally purchase a next presentation, it is illegal for a clergyman to do so in his own name, directly or indirectly, except in a way already pointed out.³ Such an induction would be void, and the Crown will have the bestowal of the next presentation.⁴ The clerk will be disabled by this statute, and punishable moreover by deprivation.⁵

Vacancy and exchange of benefices.—The weakness of the older kings and Parliaments, perplexed by the boldness and confidence of the ecclesiastics, allowed a species of exaction called first-fruits and tenths to be collected by the pope's officers. First-fruits were the value of a spiritual living for one whole year after a vacancy; but Coke says small vicarages and parsonages were excepted, though all were to pay tenths.⁶ Parliaments had often protested against these exactions as being grievous.⁷ At last a statute of Henry VIII., again protesting that they never belonged to the pope, prohibited the payment of them, and transferred them to the Crown.⁸ During the vacancy of an incumbency the common law in theory treated the profits as held for the benefit of the Church, though by custom the bishop claimed them. To meet the growing evil of bishops and archbishops purposely delaying institution in order to appropriate these profits and first-fruits, the statute of Henry VIII. already mentioned gave all the profits to

¹ Bp. St. David's *v* Lucy, 1 L. Raym 449. HOLT, C. J., said simony is an offence by the canon law of which the common law does not take notice to punish it, for there is not a word of simony in the statute of Elizabeth, but only of buying and selling.

² 1 W. & M. c. 16, §§ 1, 2. ³ 13 Anne, c. 11, § 2., *ante* p. 392.

⁴ *Ibid.* ⁵ Lee *v* Merest, 39 L. J., Eccl. 52. ⁶ 4 Inst. 120.

⁷ 34 Ed. I.; 50 Ed. III.; 12 Coke, 45.

⁸ 25 Hen. VIII. c. 20; 26 Hen. VIII. c. 3. And various statutes regulated the mode of ascertaining the values and appropriating them.—26 Hen. VIII. c. 17.; 2 & 3 Ed. VI. c. 20; 1 Eliz. c. 4; 6 Anne, c. 54; 6 & 7 Will. c. 77; 3 Geo. I. c. 10.

the next successor towards payment of his first-fruits.¹ And in construing this statute the successor or person next presented has been interpreted to mean the person *de facto* admitted, provided it is not declared by a court or statute to be a void admission. And in practice the churchwardens take out a sequestration authorising them to manage the temporal affairs, part of the profits being assigned for reasonable stipend to him who serves the cure.²

As an advowson is in most respects capable of being dealt with as other real estate, it is capable of being exchanged, which, however, is an operation which involves a double resignation and a double induction. And there were corrupt practices incident to this arrangement which a statute of Elizabeth attempted to punish.³ Another abuse much favoured in early times was the practice of bishops and others obtaining dispensations for the purpose of holding benefices *in commendam*, that is, committed to the care of another, and so held as to evade the law against pluralities. That practice, however, was put an end to in 1836.⁴

In ancient times, when remedies were slow and ineffectual, usurpations of benefices were frequent, and such superstitious importance was attached to the continuance of possession in the usurper, that the patron was held to lose his right altogether for not having in time prevented intrusion, there being no other remedy open to him. But a statute of Anne corrected this injustice, and treated a usurpation as not displacing the original right of the patron.⁵

¹ 25 Hen. VIII. c. 20. ² 1 Gibs. 749; 28 Hen. VIII. c. 11, § 3; 1 & 2 Vic. c. 106, § 100.

³ 31 Eliz. c. 6, § 7. Various powers as to the exchange of advowsons were given by statutes through the machinery of the Ecclesiastical Commissioners.—6 & 7 Will. IV. c. 77; 3 & 4 Vic. c. 113, § 73; 4 & 5 Vic. c. 39, §§ 22, 23; 16 & 17 Vic. c. 50; 23 & 24 Vic. c. 124, § 42; 31 & 32 Vic. c. 114, § 12; 33 & 34 Vic. c. 39.

⁴ 6 & 7 Will. IV. c. 77, § 18; 1 & 2 Vic. c. 106. And sinecure rectories have in recent times been gradually suppressed.—3 & 4 Vic. c. 113.

⁵ 7 Anne, c. 18.

CHAPTER IV.

ORDERS OF BISHOPS, PRIESTS AND DEACONS, AND INSTITUTION INTO BENEFICES.

A separate order of priests.—Montesquieu observed that the Egyptians, Jews, and Romans had a separate order of men as priests, and that people who have no priests are commonly barbarians.¹ The separation into laity and clergy was indeed familiar to many other nations of antiquity. The priests of India, Persia, Assyria, Æthiopia, and Gaul all derived their temporal possessions from a celestial origin.² The apostolic age, it is said, was remarkable for the vagueness of its organization in religious society. Faith and charity were the chief ties; independence and equality the leading ideas of mutual dependence, and the want of discipline and human learning was supplied by the occasional assistance of prophets, who were called to that function without the distinction of age, sex, or natural abilities, and poured forth their spirit under a divine impulse.³

In the Church of England ecclesiastical persons consist of three grades or orders, namely, bishops, priests, and deacons, and these are recognised in the liturgies, canons, and statutes.⁴ Early in the Christian era a distinction

¹ Montesq. b. 25, c. 4.

² Gibbon's Rome, c. 20. Even the Kaffirs consider it essential that their priests should be initiated before officiating, part of the duties being to detect and punish sorcerers and act as rain-makers. —*Maclean's Kaffirs*, 79, 83, 104.

³ Gibbon's Rome, c. 15.

⁴ 3 & 4 Ed. VI. c. 10; 14 Ch. II. c. 4, § 16. "Those who are to instruct presumptuous ignorance, those who are to be censors over insolent vice, should neither incur their contempt, nor live upon

between priests and bishops became settled; though controversies have long continued as to their precise mutual relations. The order of office-bearers in the Church of England next to bishops are priests and deacons, and the distinguishing ceremony by which the latter attain that position is by ordination, or a species of solemn consecration which can only be performed by a bishop. And a person presuming to consecrate the Sacrament of the Lord's Supper without being an ordained priest forfeits 100*l*.¹

Bishops and their original mode of appointment.—According to the early practice of the Church, bishops, whatever were their precise position and functions among the clergy, were elected by the laity and clergy together, though it is believed the clergy formed the more numerous constituents.² Justinian confined the electors to the nobility.³ By degrees the laity were got rid of altogether, and next the clergy became merged in the cathedral chapter, which was a select body of clergy more closely connected with the chief church of the diocese. This latter stage was reached, it is thought, about the beginning of the thirteenth century.⁴ It was not to be wondered

their alms. We therefore have the established clergy mixed throughout the whole mass of life, and blended with all classes of society."

—*Burke, Fr. Rev.*

¹ 14 Ch. II. c. 4, § 10. There were officers inferior to priests in the third century called Clerici, from their being chosen by lot, as was the custom of both Jews and Gentiles.—*Bing. Chr. Ant.* b. 1, c. 5. Deacons were, according to the civil and canon law, allowed to be ordained at the age of twenty-five.—*Just. Nov.* 123, c. 13. Deaconesses were for several centuries regularly appointed as officers of the church, being widows of mature age or virgins. One part of their duty was to assist at the baptism of women, to act as catechists, to attend to the sick, and especially to the wants of martyrs and confessors. They ceased to be appointed after the tenth century.—*Bing. Chr. Ant.* b. 2, c. 22. But though women served at the altar in 824—*Guizot Civ. Fr.* 133—they were never appointed to the office of priests. And HERODOTUS says the same of the priests of the gods and goddesses of his time.—*Herod.* b. 2, c. 35. And yet the inferior officers of the church were forbidden to resign and return to a secular life.—*Labbé*, vol. iv., Concil. pp. 759, 1051.

² Gibbon's Rome, c. 15; Cyprian, Ep. 76. ³ Nov. 123, § 1.

⁴ Van Espin, b. 13, p. 1. In England before the Conquest, bishops were appointed in the Wittenagemot; and even in the reign of William I. it was said that Lanfranc was raised to the see of Canterbury by the consent of what then corresponded to Parliament.—4

that so conspicuous an office as that of a bishop should in course of time have required the confirmation of the sovereign, and this was said to be a universal practice in all Christian countries since the time of Constantine, and was noticed in England in the time of Alfred.¹ In the time of William the Conqueror it came to be well settled, that the king appointed to the office by delivery of the ring and pastoral staff.² Indeed, Coke says more accurately, that a bishop is regularly the king's immediate officer to the king's court of justice in causes ecclesiastical, and the right of donation in the Crown necessarily resulted from the principle and foundation of property, for patronage followed the foundation.³ It would be singular if one who had so large a share in administering the laws of the country could be otherwise appointed. Such a result was inevitable in any well-ordered government, whatever may have been the early practice. The part played by the Pope in such appointments was tolerated with more or less vacillation for centuries, for want of any ready and peremptory answer being found to his interference. And

Lyttelton, Hen. II. 144. Bishops were elected after the Conquest by the clergy, and a charter of John confirmed such right of election to the dean and chapter as was the case in other countries.—*Gibs. Cod.* 133; 3 *Stubbs*, 296; *Fra Paolo (Benef.)* c. 24. The Pope assumed a right to determine disputes as to the election—3 *Stubbs*, 302; and in the beginning of the fourteenth century he assumed the patronage as well as the appellate jurisdiction. William the Conqueror, with the aid of the Pope, also removed bishops.—3 *Stubbs*, 317. One characteristic of a bishop is that he must be at least thirty years of age, that being said by the canonists to be imitated from the age of our Saviour when he began to preach.—*Bing. Chr. Ant.* b. 2, c. 10.

The Archbishop of Canterbury is the primate of all England, St. Augustin having been the first appointed in 598 by King Ethelbert. And he was primate of Ireland also to the year 1152. He has the ancient duty of crowning the kings of England. The Archbishopric of York was first created in 622. The Archbishop of Canterbury has precedence of all the nobility and next after the blood royal, while the Archbishop of York has precedence over all dukes not of the blood royal, and of all peers except the Lord Chancellor.—*God.* 13, 14. The Archbishop, besides having a diocese of his own, has jurisdiction of a visitatorial kind over the bishops within his province.—*Lynd.* 277. In 1770 a bishop was deprived, for the power of deprivation is deemed incidental to the visitatorial power.—*Bp. St. David's v Lucy*, 1 *L. Raym.*, 539; 14 *St. Tr.* 447.

¹ Bede, b. 50, c. 20.

² Ayl. Par. 126.

³ 1 Inst. 134.

it was left to a statute of Henry VIII. by strong and direct language to put an end to all such pretensions of foreigners to interfere, whatever was the show of authority under which they had once professed to act.¹ Henry VIII. created some new bishoprics out of the ruins of dissolved monasteries, and hence these are often referred to as those of the new foundation in contradistinction to those of the old foundation.²

Form of appointment of bishops by congé d'élire.—Yet this prerogative of the Crown to appoint bishops was attacked by the Pope, who claimed that the gift of the ring and staff should come from him; while the Crown should content itself with mere feudal homage. And owing to the overpowering effect of custom, even the Parliament of Henry VIII. resorted to the transparent artifice of appearing to give the power of selection to the dean and chapter by first issuing a *congé d'élire* (as was adopted in the reign of John), and then confirming their nomination. And though the legislature of Edward VI. declared this to be no election, but “only having colours, shadows and pretences of an election,” it survives to this day, not without exciting astonishment in bystanders.³ The astonishment lies in the effort to understand how a chapter can be said to elect when the person to be elected is dictated to them and they can be punished by *præmunire* or forfeiture of lands and goods for not choosing the person so nominated. And the astonishment still further increases when the forms observed in this fictitious election allow objectors to come forward to object, while there is no court or constituted authority in existence to entertain or dispose of such objections.⁴

¹ 25 Hen. VIII. c. 20, § 3. ² 31 Hen. VIII. c. 9. ³ 1 Inst. 134; 3 Salk. 71; 25 Hen. VIII. c. 20, §§ 3, 4; 1 Ed. VI. c. 2.

⁴ 25 Hen. VIII. c. 20, § 6; Hampden's case; Jebb's Report; Temple's case, Phillim. Ecc. L. 52. The bishop after being appointed must be consecrated.—25 Hen. VIII. c. 20, § 4. The form of consecration is set forth in the Prayer Book.—Article 36. The bishop also must take an oath of obedience to the archbishop, and subscribe the thirty-nine articles.—14 Ch. II. c. 4. The letters patent of the Crown nominate the bishops and archbishop who are to take part in the consecration, and to refuse to act within twenty days is an offence punishable by *præmunire*.—25 Hen. VIII. c. 20, § 6. On consecration the bishop's status is complete.—3 Salk. 481. The bishop does feudal homage to the Crown for his temporalities and

Bishops as peers of parliament.—When a bishop is duly appointed and consecrated, he is on the footing of a peer of the realm, and is entitled to receive his writ like other peers to attend the House of Lords. And so important as constituent members of the House of Lords were they once deemed, being with the abbots the great majority of that assembly, that it was sometimes doubted whether a statute would be valid which did not show that they concurred in it, or at least were present.¹ And some have doubted whether they sat by virtue of their barony or by usage, as having this dignity annexed to their office—a nicety which can now be of little importance.² The bishops were excluded by statute from sitting in Parliament in 1640; and were restored in 1661.³ But though bishops and archbishops sit in Parliament like peers of the realm, there is one particular in which they do not share the privileges of the peerage, namely, in being tried by their peers for treason and felony, or taking any part in the trial of other peers for capital offences. Various

barony.—25 Hen. VIII. c. 20, § 5. The boundaries of the diocese of bishops were revised and readjusted in 1836.—6 & 7 Will. IV. c. 77; 10 & 11 Vic. c. 98, 108; 1 Vic. c. 30; 13 & 14 Vic. c. 94; 23 & 24 Vic. c. 124. A bishopric is subdivided into archdeaconries, deaneries, and parishes.—1 Inst. 94.

¹ 2 Inst. 585; 4 Inst. 1. About the middle of the nineteenth century the bishops bore only the proportion of one-fourteenth of the whole House of Peers. COKE says that bishops ought to be summoned to Parliament, but that an Act of Parliament is valid whether they assent or not to it. He says an Act of Parliament was proposed to be passed that no man should contract or marry himself to any Queen of England without the special licence and assent of the king. “And the bishops and clergy, being present, assented to this till as far forth as the same swerved not from the law of God and of the Church, and so as the same imported no deadly sin.” And this was holden no assent, but the Act was passed omitting the preliminary statement that the prelates assented.—2 Inst. 586.

² 1 Inst. 97; 4 Inst. 1, 12; Hale quoted, Warburton’s Alliance, 131.

³ 16 Ch. I. c. 27; 13 Ch. II. c. 2. On the occasion of the union between England and Scotland the danger to the church, and especially of the exclusion of the bishops from the House of Lords, was used as an argument against it; and it was urged that, at least, the Scotch members should be prevented voting in any ecclesiastical matter.—*H. L. Debates*, 1706. On the creation of some modern bishoprics a limited right to sit in Parliament, according to priority, has been declared by statute 10 & 11 Vic. c. 108 § 2. Even the place of sitting of bishops in the House of Lords is defined by statute, 31 Hen. VIII. c. 10, § 3.

ancient canons and constitutions directed them to take no part in trials for capital offences, or, as it was described, in causes of blood.¹ By this it is true it was only meant, that though they might sit and hear, they were to retire before the voting. And though a statute of William III. seemed to make no exception of spiritual peers, that statute was held to apply only to trials before the High Steward, and not to trials and impeachments before Parliament itself. But in either case, the bishops could not vote in capital cases.² And as regards the right to be tried by their peers, *i.e.* by the temporal peers, they could only be so tried if the Parliament was sitting.³ This was said to be because the bishops sat, not by virtue of nobility, but solely by virtue of their offices, or because they thought if they were so tried they would admit a temporal jurisdiction.⁴

Powers and duties of bishops.—The bishops were at first the perpetual censors of the morals of the people, and soon reduced the practice of penance to a kind of code.⁵ Charlemagne is said to have first permitted bishops to have prisons of their own in which to confine lay offenders, while the monasteries had prisons for refractory clerks.⁶ In those times temporal and ecclesiastical jurisdictions were blended and confused without attempt at discrimination.

¹ Gibs. 125; Lind. 269; 3 Inst. 30. ² 7 & 8 Will. III. c. 3; Foster, Cr. L. 247. ³ 2 Hawk. 424.

⁴ 1 Phillim. Eccl. L. 76. In 1700 when a bishop was deprived of his office by the archbishop's court, the Lords resolved that he could not claim the privilege to be tried by his peers in opposition to the archbishop's jurisdiction, and that after deprivation all claim to retain his temporalities ceased.—*Lucy v Bp. Watson*, 14 *St. Tr.* 447. In the early part of George III. it was doubted if a bishop on resigning could retain his seat in the House of Lords, and hence the Bishop of Rochester's resignation was not accepted.—1 *Hallam, Const. H.* c. 2. But resignation is now allowed by statute, see *post*.

⁵ Gibbon's *Rome*, c. 20.

⁶ Giannone, b. vi. c. 7. Bishops had anciently large powers of discipline. At an early date it was settled that he had power to scourge the inferior clergy, but could only imprison the superior clergy.—*Concil. Matiscon.* can. 5. And thirty-nine stripes was the limit of the former, because Moses specified forty as the maximum. It was deemed a breach of discipline for one of the clergy who quarrelled with another not to submit the quarrel to the bishop; and resorting to a secular tribunal was a cause of deprivation.—*Bing. Chr. Ant.* b. xvii. c. 5. In the eighth century a bishop was bound to keep a separate house near the church for the purpose of entertaining strangers.—*Ecgbright's Exc.* A.D. 740.

Though their powers over the laity have long since ceased they have considerable powers over the clergy, all of whom take an oath of canonical obedience to their bishop, and can be proceeded against for an ecclesiastical offence if they disobey a lawful order in such matters as are lawful, as will be noticed in a subsequent page relating to the offences of the clergy. Thus a bishop, subject to appeal to the archbishop, was held to have the power to inhibit at his pleasure a beneficed and licensed clergyman of another diocese from officiating or preaching in his diocese without his licence, though such clergyman have the permission of the incumbent.¹ He has also power, as the visitor of the cathedral, to order the removal of ornaments which he finds there, if they are illegal.² In most ecclesiastical matters the ultimate control of discretionary powers exercised by the incumbent and by churchwardens has been vested in the ordinary, who is usually the bishop, but in some places it is the dean and chapter.³ The bishop cannot, it is true, render ceremonies legal which the law deems illegal.⁴ And while it is an ecclesiastical offence for any clergyman to disobey the lawful commands of the ordinary, yet this rule requires the distinction to be carefully observed as to what is and what is not a lawful command.⁵ The oath of canonical obedience does not mean that the clergyman will obey all the commands of the bishop, against which there is no law; but that he will obey all such commands as the bishop is by law authorized to impose. For example, he would not be bound to publish during divine service a notice of a proposed meeting of clergy which the bishop was interested in promoting.⁶ The ordinary has also, as

¹ *Bp. Down v Miller*, 11 Ir. Ch. R. App. 1; 5 L. T., N. S. 30.

² *Philpotts v Boyd*, L. R., 6 Priv. C. 435. ³ *Parham v Templar*, 3 Phill. 241.

⁴ Express power was given to the bishop by statute to enforce a third service in a parish under certain circumstances, or two services.—58 Geo. III. c. 45, § 65; 1 & 2 Vic. c. 106, § 80.

⁵ *Bp. Winchester v Rugg*, L. R., 2 Priv. C. 223.

⁶ *Long v Bp. of Capetown*, 1 Moore, P. C., N. S. 411. It was once deemed a good excuse for not obeying the bishop, that he was suspected of having obtained his office by simony.—*Bing. Chr. Ant.* b. xvi. c. 1. When Henry VIII. abolished the practice of resorting to the Pope for dispensations care was taken to reserve power to the Archbishop of Canterbury to grant licences, dispensations, and

will be seen, large powers in testing the fitness of presentees in point of learning and doctrine. It is true, that if he reject a presentee, he must state the specific ground of rejection, so that the high court may see that it is within his powers.¹ The ordinary has also the duty of granting a faculty to do certain things which it is deemed unsafe to leave to the arbitrary discretion of the incumbent or any other individual; and yet there are limits beyond which the faculty may be altogether inept.² Thus to convert a consecrated place into a highway is beyond the power of any faculty.³ But it is available in order to enlarge a church or erect a vault in the churchyard, to appropriate pews or set up monuments.⁴ On the other hand it is an ecclesiastical offence for the incumbent to alter the fabric of the church without a faculty of this description.⁵ And for like reasons a churchwarden is not safe in removing an unlawful ornament without a faculty.⁶ And to remove dead bodies from consecrated ground requires in all cases a faculty.⁷

In the event of a vacancy in the office of a bishop, there is, by the theory of the ecclesiastical common law, a guardian of the spiritualities to attend to the spiritual duties, and the dean and chapter seem to be the ordinary guardians or some ecclesiastical person by prescription.⁸ Statutes were necessary to enforce the duty of repairs on the guardian of Church property during a vacancy in the bishopric, and Magna Charta had an express provision to that effect; and to allow remedies against trespassers in this interval.⁹ On the other hand, the temporalities of the bishopric or

faculties to the king, provided the things that were to be done were not contrary to the Holy Scriptures and laws of God.—25 Hen. VIII. c. 21. But the difficulty under such an enactment obviously will be to define when this contrariety exists, and how and by whom it is to be decided.

¹ *Bp. Exeter v Marshall*, L. R., 3 H. L. 17. ² *Rugg v Kingsmill*, L. R., 2 Priv. C. 59.

³ *St. John's v Walbrook*, 2 Rob. Eccl. 515. And yet it was allowed to convert part of the churchyard into a vestry room.—*Campbell v Paddington*, 2 Rob. Eccl. 558.

⁴ *Groves v Hornsey*, 1 Hagg. Cons. 188; *Rosher v Northfleet*, 3 Add. 14; *Rich v Bushnell*, 4 Hagg. Eccl. 164. ⁵ *Sieveking v Kingsford*, 36 L. J., Eccl. 1. ⁶ *Ritchings v Cordingley*, L. R., 3 Eccl. 113. ⁷ *Adlam v Colthurst*, L. R., 2 Eccl. 30. ⁸ 2 Inst. 15; 25 Hen. VIII. c. 21, § 10. ⁹ 2 Inst. 151.

archbishopric belong to the Crown by virtue of the prerogative until the successor is confirmed.¹ Owing to the singular notion pervading the law of ecclesiastical persons that they could not resign their offices when once appointed, a statute of 1869 was passed to obviate this disability, by permitting bishops and archbishops to get rid of their office and duties and obtain a retiring allowance in a mode therein pointed out.² And the same statute authorises the appointment of a bishop coadjutor.³

Deans and chapters, prebendaries, &c.—Besides the ordinary priests and deacons, a group of clergy surrounded the bishop in his cathedral, and indeed at first all bishops were merely priests of large dioceses or districts, living with their clergy in a small community, until the wants of outlying places called away some of them to supply regular and increasing exigencies. And hence, in the latter case, arose parishes and parish priests. The communities were distinguished as chapters, convents, and colleges, according as they grew out of cathedrals, convents, or colleges. The diocese of a bishop was, at an early period, divided into deanries, or groups of ten parishes.⁴ And by degrees one dean came to be the chief of all the others, and to have some superintending power over all the clergy as administering much of the business and discipline of the diocese.⁵ Deans on the older foundations are elected by the chapter on a *congé d'élire*, and in the modern foundations are appointed by Royal letters patent.⁶ The canons of 1603 regulate some of the duties. The dean is head of the chapter,

¹ 2 Inst. 15. Suffragan and assistant-bishops have sometimes been appointed as deputies or assistants to those who have dioceses; and a statute of Henry VIII. recognised the utility of such appointments, especially with a view to act more efficiently in certain towns in the diocese.—26 Hen. VIII. c. 14. The archbishop or bishop of a diocese, with this view, is authorised to nominate two suitable persons, one of whom is selected by the Crown, and is to be called bishop suffragan of the same see with a title applicable to the town where he is to officiate; and the archbishop consecrates him. The suffragan's power and duties are specified in the commission from the archbishop or bishop, and for his better maintenance the suffragan bishop may have two benefices with cure. And coadjutor bishops in ancient times were sometimes ordained to assist and succeed the bishop of a diocese.—*Bing. Chr. Ant.* b. 2, c. 13.

² 32 & 33 Vic. c. 111.

³ Ibid. §§ 3, 4.

⁴ Gibs. 171.

⁵ Ken. Par. Ant. 634. See p. 415.

⁶ Gibs. 173.

which consists of canons and prebendaries, and officers, all presumed to assist in the better ordering of the things of the cathedral church,¹ those chapters founded by Henry VIII. being deemed new, in contradistinction to the ancient foundations.² The legislature has several times endeavoured to enforce freedom in elections to cathedral preferments.³ And with this view the majority was declared by statute able to bind the whole.⁴ And in modern times statutes have largely regulated many particulars respecting their property and powers.⁵

Archdeacons and rural deans.—The office of archdeacon in ancient times was used to assist the bishop and censure the inferior clergy, though the area of his jurisdiction was matter of dispute. Nor is it settled whether he was originally elected by the deacons or appointed by the bishop.⁶ And as in cases of doubtful origin of rights and customs in civil matters, the writers on the laws of the clergy have resorted to the fiction of a lost grant from the bishop, assuming that this was a most satisfactory explanation of all that concerns his powers.⁷ The archdeacon exercises what is deemed ordinary jurisdiction over a part of the diocese like a local judge, to whom certain episcopal authority is delegated.⁸ At the time of the conquest the charter of William practically put an end to both the bishop and the archdeacon exercising jurisdiction, and thus made way for the judges, who have ever since disposed of the greater part of this kind of superintending authority.⁹ An archdeacon is appointed by the bishop and sometimes by a lay patron. He must now be a priest of six years'

¹ God. 56, 58. ² 1 Inst. 95. ³ 3 Ed. I. c. 5; Artic. cleri, 9 Ed. II. c. 14; 31 Eliz. c. 6. ⁴ 33 Hen. VIII. c. 27; Dean of Windsor, Freem. 504.

⁵ The position and regulation of deans and chapters, and canons, after 1841, have been prescribed by statutes 3 & 4 Vic. c. 113; 4 & 5 Vic. c. 39; 13 & 14 Vic. c. 94; 36 & 37 Vic. c. 39; 27 & 28 Vic. c. 70; 29 & 30 Vic. c. 111. Deans, archdeacons, and canons must since that date be priests of six years' standing, except a canonry is annexed to a university office.—3 & 4 Vic. c. 113, § 24; and the statutes regulate the estates and endowments as well as residence houses. By 3 & 4 Vic. c. 113 (1840) 360 prebends were suppressed and their property vested in the Ecclesiastical Commissioners.—136 *Parl. Deb.* (3) 2050.

⁶ 1 Phillim. Eccl L, 236.

⁷ Gibs. 969.

⁸ Gibs. 170.

⁹ Ibid.

standing.¹ And he exercises a visitorial jurisdiction, and certifies to the bishop the offences of the clergy and churchwardens. And he even claimed at one time jurisdiction over laymen as well as clergy, which is not to be wondered, for the canon law encouraged him to impose penalties on laymen for not repairing their parish church.² The archdeacon or his judge, called the official, entertained sometimes applications for faculties or disputes as to election of churchwardens. And there is an appeal from his court to that of the bishop.³ The office of archdeacon has in modern times been regulated in many of its details by express statutes.⁴

A subdivision of dioceses smaller than archdeaconries is a rural deanry, which is supposed to be as ancient as Edward the Confessor.⁵ The bishop appoints the rural dean, whose duty it is to execute the process of the bishop's consistory court, and to hold a rural chapter to inspect the manners of the clergy;⁶ this last duty at a later period having, to some extent, devolved on the churchwardens. In very modern times this last function was revived or recognised, and made ancillary to the archdeacon.⁷

Perpetual curates and chapels of ease.—Besides deacons and priests, there are curates who are in reality only priests, not attached to any incumbency, but acting as assistants of rectors or vicars, who employ and pay them as such. A perpetual curate, on the other hand, is one who is nominated by the impropriator for the discharge of the spiritual duties. The perpetual curate is so called because, when once nominated by the impropriator and licensed by the bishop, he is no longer removable by such

¹ 3 & 4 Vic. c. 113, § 27.

² Lindw. De off. archd.

³ 24 Hen VIII. c. 12. ⁴ 6 & 7 Will. IV. c. 77; 3 & 4 Vic. c. 113; 4 & 4 Vic. c. 39; 13 & 14 Vic. c. 94; 37 & 38 Vic. c. 63.

⁵ Kennett, Par. Ant. 633.

⁶ Gibs. 973.

⁷ 6 & 7 Will. IV. c. 77, § 1; 3 & 4 Vic. c. 86, § 3; 3 & 4 Vic. c. 113, § 32; 34 & 35 Vic. c. 43, §§ 8, 12; 34 & 35 Vic. c. 44, § 5. Besides the rural deans proper, there were also some anomalous officials called deans of peculiars, whose functions are almost entirely matter of special custom in a few churches or chapels.—*God.* 52; *Wats.* c. 15. But now the jurisdiction over all these peculiar places has been transferred to the bishop.—6 & 7 Will. IV. c. 77, § 10; 3 & 4 Vic. c. 86; 10 & 11 Vic. c. 98; 13 & 14 Vic. c. 94, § 24.

impropriator.¹ A perpetual curacy is not, however, a benefice in the eye of the law, and so is not subject to the rule as to pluralities,² though it is so for the purpose of dilapidations.³ And in his capacity of perpetual curate he has possession of the churchyard only for spiritual purposes; and hence cannot exclude the lay rector from using the soil and herbage.⁴

Besides those called perpetual curates there is also a variation of the same function as to chapels of ease. As parish churches were found to be inconveniently distant from parts of the parish, a practice arose many centuries ago of lords of manors or other benefactors building or dedicating a chapel of ease for the accommodation of those parts, and the parish priest setting apart some of his stipend for the maintenance of a curate. In order to complete this arrangement the bishop, the patron, and the parish priest required to join.⁵ The bishop's licence is necessary before this class of curates can officiate, and the curate must be in priest's orders.⁶

Compulsory employment of curates.—As the incumbent of a benefice is not necessarily licensed to preach, the canons of 1603 recognised a duty in him to find a curate, seeing that preaching is part of the function of a parochial church.⁷ A class of curates called stipendiary curates are employed in most populous parishes to assist the rector or vicar. Such curates on appointment require to take an oath and declaration of assent.⁸ Older statutes relating to this portion of the clergy were repealed and superseded by the Act of 1837.⁹ If a non-resident incumbent refuse or neglect, the bishop may, after a time specified, appoint and license a curate and assign his salary.¹⁰ Moreover in all cases, if the bishop see reason to believe that the ecclesiastical duties of a benefice are inadequately performed, he may issue a commission of inquiry, and after their report may require the incumbent to nominate a curate,

¹ Gibs. 819; D. Portland v Bingham, 1 Consist. 165. His power of leasing under 1 Geo. I. st. 2, c. 10, was considered in Doe d. Richardson v Thomas, 9 A. & E. 556; Doe d. Bramall v Collinge. 7 C. B. 939. ² Arthington v Chester, 1 H. Bl. 425; Horne v

Lodge, 3 Taunt. 463.

³ Mason v Lambert, 12 Q. B. 795.

⁴ Greenslade v Darby, L. R., 3 Q. B. 421. ⁵ Ken. Par. Ant. 585.

⁶ Can. 1603, § 48; Can. 1865, § 36.

⁷ Can. 1603, §§ 46-8.

⁸ 28 & 29 Vic. c. 122.

⁹ 1 & 2 Vic. c. 106.

¹⁰ Ibid. § 75.

and failing such nomination may himself appoint and license one with a proper stipend.¹ But the incumbent may appeal against such a requisition to the archbishop, whose decision is final, being subject to no further appeal.² The bishop is appointed by the same statute the referee in all differences between the incumbent and his curate as regards stipend, and on failure to pay the same the bishop has power to enforce payment by monition and by sequestration of the profits.³ The bishop has power also to revoke the licence of such curate for any cause, provided he first give the curate an opportunity of showing cause to the contrary; and provided that the curate may within a month appeal to the archbishop.⁴ In the latter event the archbishop must also hear the appellant before deciding, while at the same time his decision is final.⁵ On the occasion of these hearings by the bishop, no particular form of proceeding is essential, provided substantial justice is

¹ 1 & 2 Vic. c. 106, § 77.

² *Poole v Bp. London*, 1 E. & E. 545; 14 Moore, P. C. 262. And in large benefices, as defined by the statute, the bishop may require a curate to be employed as an assistant.—1 & 2 Vic. c. 106, § 78. Moreover, the bishop may at discretion require two full services in any church or chapel of his diocese every Sunday throughout the year.—*Ibid.* § 80.

In 1831 there were 10,718 incumbents; there were 1,006 curates of resident incumbents, and 4,224 curates of non-resident incumbents; total, 15,948 persons.

In 1875 there were 13,300 incumbents and 5,765 curates; total, 19,065.

In 1875 another estimate of the established clergy was 24,738; those actually connected with churches being 19,237.—*Rep. H. C. Pub. Worsh.* 1875, p. 296.

³ 1 & 2 Vic. c. 106, § 83. The statute supplies a scale of payment for curate's stipend according to population and value of the benefice.—*Ibid.* § 85. The general minimum stipend is 80*l.* a year. The incumbent may at any time on obtaining written permission from the bishop, give six months' notice to his curate to leave the curacy; and if the bishop refuse such permission, the incumbent may appeal to the archbishop.—1 & 2 Vic. c. 106, § 95. If the curate occupy the house of residence and neglect to deliver up possession, he incurs a penalty of 40*s.* a day for his wrongful possession.—*Ibid.* § 96. On the other hand, the curate cannot give a shorter notice to quit than three months, and the notice must be given to the bishop as well as to the incumbent, otherwise he forfeits six months' stipend.—*Ibid.* § 97.

⁴ 1 & 2 Vic. c. 106, § 98. ⁵ *Poole v Bp. London*, 1 E. & E. 545; 14 Moore, P. C. 262.

done ; and the ground of revoking the licence is not necessarily any legal misconduct such as could be the subject of redress in another proceeding, for the discretion confided to the bishop is liberal. And in the case of sequestration of a benefice, care is taken that the bishop shall appoint a curate to attend to the religious services, and his stipend is made a first charge out of the income of the benefice.¹

Lecturers.—Besides the regular clergy, consisting of rectors, vicars, and curates, lecturers are also frequently appointed in populous cities to assist the rector, being usually chosen by the vestry or chief inhabitants by virtue of some endowment which has been left for such purpose by benevolent donors ; and sometimes the appointment is entirely voluntary and temporary. Such lecturers are subjected in many respects to the same statutory regulations as other spiritual persons.² In some of these cases disputes may arise as to the validity of the election, and this becomes a question for a court of law ; while all that the bishop can interfere with is the qualification and fitness of the person elected.³ The terms of the foundation may entirely regulate the mode of election ; yet the usage that has prevailed will again modify and explain ambiguous words.⁴ The previous licence of the bishop to these lecturers was made a statutory qualification in the reign of Charles II.⁵ At that time the law went the length of making it an offence punishable by three months' imprisonment for one to lecture without this sanction, and this remains law at the present day.⁶ And it was also made compulsory that no lecture should be preached unless the common prayer and service preceded it.⁷ In modern times the legislature has interfered by authorising the bishop and incumbent to order the lecturer to perform parochial duty as assistant curate, and to suspend or remove him for refusing.⁸

Such are all the classes of the working clergy of the

¹ 1 & 2 Vic. c. 106, §§ 99, 100 ; 34 & 35 Vic. c. 45. ² 1 & 2 Vic. c. 106, § 31 ; 3 & 4 Vic. c. 86. ³ *R. v Bp. London*, 13 East, 419. ⁴ *Att.-Gen. v Forster*, 10 Ves. 342. ⁵ 14 Ch. II. c. 4, § 15.

⁶ *Ibid.* § 17 ; 15 Ch. II. c. 6, § 6. ⁷ 14 Ch. II. c. 4, § 18.

⁸ 7 & 8 Vic. c. 59. The bishop sometimes also licenses a lay person as a reader of prayers ; but this is not an ecclesiastical preferment or a benefice. And the office is recognised by statute 3 & 4 Vic. c. 86.

Church of England; and as the functions attaching to the rectors and vicars of the parish church are the most conspicuous, and lie at the root of all others, it is now necessary to state by what steps they arrive at the stage of being incumbents seised of a benefice, and what qualifications are exacted of those who wish to enter the clerical profession.¹

Qualifications of priests.—The office of priest may be assumed to be one peculiarly for the deliberate choice of the person seeking it. Yet one of the extraordinary delusions of ancient times was, that it was not only good sense but quite lawful for a congregation to seize and force a person to be ordained, and to force the bishop to ordain him. And St. Augustine was himself so treated. And this practice continued till at last the Emperor Leo decreed that none should be ordained against his will.² And a still more extraordinary doctrine was, that such bishops when once ordained against their will could not relinquish the office.³ One singular rule in ancient times also was, that no person was fit to be a priest who was mutilated in body.⁴

The early English Church seemed to follow the same

¹ The number of the clergy in the Church of England is stated, *ante* p. 418.

² Possid. vit. August. c. 4; Leo Novell. ii. in Append. Cod. Theod.

³ Bing. Chr. Ant. b. iv. c. 7.

⁴ This singular ground of disqualification for a priest, that he must not be mutilated in body, was an accepted axiom. The Council of Nice, instead of seeing the hardship of such a rule, showed great nicety in drawing a distinction between the cases of those who had one limb cut off in order to save the rest of the body, or who had lost part of their bodies by the cruelty of persecutors; and the council gravely held, that these circumstances took these last cases out of the general rule of disqualification. But the council was at the same time quite resolute in holding, that no one who had dismembered himself while in health was on any pretext to be ordained, for this showed he was a self-murderer and an enemy of the workmanship of God.—*Labbé*, vol. i. pp. 28, 41. It was supposed that this last rule was made to counteract the mistaken notion on which Origen and some others had acted.—*Euseb.* b. vi. c. 8. And a soldier was deemed disqualified also, because he had either imbrued his hands in innocent blood, or at least bound himself to do so.—*Labbé*, vol. ii. pp. 1224, 1284. Another still more inexcusable ground of disqualification was, that the person was or had been a pleader at law.—*Bing. Chr. Ant.* b. iv. c. 4.

rules. A maimed person was deemed altogether disqualified to be a priest.¹ And so was a person who had married a second wife.² It was also once deemed in this country a good objection to a presentee, that he was illegitimate.³ And it has been always considered, that neither an unbaptized person nor a woman can be validly ordained. By our canons a deacon must be 23 and a priest must be 24 years old ;⁴ though the archbishop could by a faculty dispense with the appointed age as regards a deacon.⁵ And the ecclesiastical courts were allowed to be the exclusive judges, whether these conditions had been satisfied, for the temporal courts could not interfere.⁶ But the legislature itself at length interfered, and declared that after 1809 the admission of priests and deacons under the age above prescribed should be thereby void in law, and the person admitted should be incapable of holding a benefice by virtue of such admission. And yet no title to present by lapse should accrue by any such avoidance or deprivation except after six months' notice from the ordinary to the patron.⁷

The presentation of a priest to a benefice.—In order that a benefice may not be allowed to be vacant too long to the injury of the parishioners, a period of six months only is allowed to the patron to present a fit person. Why this period was fixed upon no precise reason seems to be given, though some period was obviously necessary to be settled in practice, and one period is as good as another when so fixed. If the patron neglects in this period, or the living becomes otherwise void, the bishop then may present ; and Lord Hardwicke said, that the patron may present even after the six months if the bishop has not yet collated.⁸ If however the avoidance arise from resignation or deprivation, the six months do not commence till notice has been given by the bishop to the patron.⁹ If the bishop do not collate within six months after the lapse,

¹ Ecgbright's Ans. A.D. 734.

² Ecgbright's Exc. A.D. 740.

³ Year B. 32, Ed. I. p. 214 ; Leg. Can. Cealth, A.D. 785 ; 1 Wilk. 145. The Constitutions of Clarendon prohibited the sons of villains being ordained clerks without the consent of the lord of the land on which they were born.—*Barringt. Stat.* (Hen. II.) 82.

⁴ Can. 1603, § 34 ; 13 Eliz. c. 12.

⁵ Gibs. 145, 146.

⁶ Roberts v Paine, 3 Mod. 67.

⁷ 44 Geo. III. c. 43.

⁸ Com. Dig. Egl. H. 10 ; Wilson v Dennison, Amb. 82.

⁹ Ibid.

then it devolves on the archbishop, and failing the archbishop, on the sovereign as the paramount patron or superintending power, whose duty and privilege it is to see that the public interest is looked after. This rule was recognised in the time of Edward III.¹ But a bishop cannot be allowed to protract the institution in order to take advantage of the lapse of time he thereby causes. These six months are calculated as calendar months, and count not from the avoidance or resignation, if such has been the cause, but from the notice given to the patron.²

A maxim of the common law was, that if one who was already seised of a benefice was presented to another, the former was *ipso facto* vacated.³ And this rule will still apply if a declaration in writing is not made to the bishop of the diocese where the benefice or cathedral preferment already possessed is situated, in conformity with a recent statute.⁴ It was also a maxim of the canon law that no person could present himself to a benefice; though that may now be done.⁵ And where an advowson belongs to joint tenants, trustees, or executors, and one of them is otherwise qualified, the rest may validly present him.⁶

Fitness of presentee for institution.—Though a patron may present to a benefice, it seems to have been always the doctrine of the canon law, that the bishop must decide whether the presentee is qualified. And this doctrine is recognised in the statute of Edward II.,⁷ and may be deemed part of the common law of the realm. The bishop accord-

¹ 25 Ed. III. st. 6, c. 7.

² 2 Inst. 360. A presentation requires to be in writing under the Statute of Frauds.—29 Ch. II. c. 3. And a stamp duty is imposed, with some exceptions.—33 & 34 Vic. c. 97, §§ 3, 37. The presentation may be revoked, because it is deemed that no interest has vested in the presentee till he has been inducted.—*Rogers v Holled*, 2 W. Bl. 1039. But presentation and institution are stages in the process, and though by statute none but a priest can be instituted, yet even a layman may be presented if he is capable of being ordained a priest within a given time.—14 Ch. II. c. 4.

³ Cro. Eliz. 601. ⁴ 1 & 2 Vic. c. 106, § 11. ⁵ Br. Ab. Corp. 34, see *ante*, p. 392.

⁶ *Potter v Chapman*, Amb. 101.

⁷ 9 Ed. II. st. 1, c. 13; 2 Inst. 631. In the early ages of the Church, the people were said to have a voice in the election of their clergy, especially of their bishops, and were not restricted to a mere veto; though the extent of the custom is obscure.—*Bing. Chr. Ant.* b. iv. c. 2, see *ante*, p. 407

ing to an ancient constitution was allowed two months to make his examination and admit the presentee; but the canons of 1603 reduced this period to twenty-eight days.¹ And though the bishop has usually this jurisdiction, yet by custom it is sometimes vested in others who have a peculiar jurisdiction, such as deans, or deans and chapters.² The points as to which the examination is to take place are the age, learning, behaviour, and holy orders. If the presentee was ordained by another bishop, he usually produces letters of orders and letters commendatory of his diocesan.³ But he is not bound to do so as a condition precedent to his examination. And if the bishop reject the presentee, he is bound to state the specific ground, so that a court may see that it was adequate.⁴ Another rule enforced by a canon was, that none should be admitted either deacon or priest who had not some certain place where he might use his function, that is to say, he must be ready with a presentation, or be a master of arts, or fellow of a college; or the bishop himself must maintain him till a living is found for him.⁵ And so cogent is this duty deemed, and so clearly does it belong to some one to find the candidate for ordination a living, or, as it is called, to give him a title, that it is deemed a condition imposed for the good of the Church, and one which even the candidate cannot waive.⁶ The object was said to be to prevent idle persons being admitted into the Church.

Ordination of priests, and their learning.—The rules as to ordination of priests and deacons have varied from time to time, but they were last settled according to a form prescribed by statute, to which the Book of Common Prayer was annexed.⁷ The degree of learning and the

¹ Lynd. 138, 215; Can. 1603, § 95.

² Gibs. 804; 3 Lev. 212.

³ Gibs. Cod. 806; Can. 1603, § 39.

⁴ Bp. Exeter v Marshall, L. R., 3 H. L. C. 17.

⁵ Can. 1603, § 33; God. 13; Gibs. 140.

⁶ Gibs. 141.

⁷ 5 & 6 Ed. VI. c. 1; 36th article; 14 Ch. II. c. 4, § 2. The Convocation, not satisfied with recommending a good form, professed to excommunicate all who affirm that such form contains anything repugnant to Scripture—a threat now incapable of being enforced.—*Can.* 1603, § 8. The ordination must take place in a cathedral or parish church, and on certain Sundays in the year.—*Ibid.* § 31. The canons provide, that no fee or money shall be taken for admitting persons to sacred orders.—*Ibid.* § 35. And to receive

mode of ascertaining it are peculiarly matters for the discretion of the bishop. From the earliest times persons about to be ordained were subjected to examination as to faith, morals, and outward condition.¹ Thus in one case the only reason that the bishop gave for rejecting the presentee was, that the presentee was "an inveterate schismatic" without further particulars; and the majority of the judges said that was not a legal reason, for the cause of the schism must be set forth.² The bishop was however held in another case entitled to refuse to institute one to a benefice in Wales who was not able to speak the Welsh language, the people not understanding English.³ And a statute now expressly declares such to be a valid cause of refusal to any Welsh benefice.⁴ In the cognate case of lecturers and preachers who are by statute required to be first approved and thereto licensed by the bishop,⁵ the court held, that if the bishop inquired, and then said that he conscientiously disapproved, this was a sufficient judgment, and a court of law would not grant a mandamus to him to approve: at the most it could only order him to inquire,⁶ for if this judgment of the bishop were not sufficient, it would be merely substituting the judgment of the Queen's Bench division for that of the bishop.⁷ And in this respect the approval of a lecturer or preacher differs from the admission of an ordinary presentee; for in the latter case the bishop's duty is to examine, which implies that he must state particular heads of his examination. While the bishop refusing to institute a presentee for want of learning must specify the particulars, it has been said to be difficult to restrict him so closely in the matter of objections founded on character, and especially as to past as well as to recent character, for this knowledge may be acquired in many ways and even by personal acquaintance. Nevertheless it has recently been held, that at least the bishop must set forth sufficient particulars to enable the court to be satisfied that both in respect of learning and doctrine

money or profit, or the promise of it, for ordaining a minister is a cause of forfeiting 40*l.*—31 Eliz. c. 6, § 9, see *ante*, p. 399.

¹ 9 Ed. II. st. 1, c. 13; 13 Eliz. c. 12; Can. 1603, § 34.

² Specot's Case, 5 Rep. 58.

³ Cro. Eliz. 119.

⁴ 1 & 2 Vic.

c. 106, §§ 103-5. ⁵ 14 Ch. II. c. 4, § 19.

⁶ R. v Archbp.

Canterbury, 15 East, 117.

⁷ Ibid.

the grounds alleged are *primâ facie* adequate to warrant rejection.¹ If the bishop refuse institution for good cause, it is his duty to give notice to the patron, and of the precise cause of refusal, so that the latter may have an opportunity to make a fresh presentation before a lapse occurs.² And while the bishop is not allowed to protract this notice in order to gain the advantage of a lapse, the patron is on the other hand not entitled to extension of time merely to enable him to obtain another unexceptionable presentee.³ When the bishop has instituted the presentee, this completes his title to the performance of spiritual functions; nevertheless, so far as regards the temporalities, the church is said not to be full, till the presentee has been inducted, this last stage indicating full seisin of the benefice.⁴

Institution and induction of presentee.—The canon of 1603 required an oath against simony to be administered before admission: but now a declaration is substituted, and a new canon gives a form of such declaration.⁵ An oath of canonical obedience is also taken,⁶ and a declaration of assent to the Thirty-nine Articles and Prayer Book;⁷ also the oath of allegiance.⁸ When the bishop or his chancellor or commissary has instituted the clerk, the bishop then grants a mandate under seal to the archdeacon or other clergyman to induct the presentee, which is often done in the way usual with delivery of seisin, namely,

¹ Willis v Bp. Oxford, 2 Prob. D. 200. ² 2 Inst. 631; 5 Rep. 58.

³ Cro. Eliz. 119. Not only must a priest have these qualifications before he can act in course of his duty, but he must have the licence of his bishop or of one of the universities to preach.—*Can.* 1603, § 36. If the patron finds, that his presentee is rejected for what he considers insufficient cause, his remedy is an action of *quare impedit* in the Common Pleas division.—3 & 4 Will. IV. c. 27, § 30. If the bishop refuses without good cause to admit and institute a clerk, the clerk has his remedy by duplex *querela* and the patron has also his remedy by *quare impedit*, and the bishop must then state the specific ground of refusal.—Hob. 15.

⁴ 2 Inst. 356. ⁵ *Can.* 1603, § 40; 28 & 29 Vic. c. 122, § 2; *Can.* 1866. ⁶ Gibs. 810; Clarke, tit. 91. ⁷ 28 & 29 Vic. c. 122, § 1; *Can.* 1866.

⁸ 31 & 32 Vic. c. 72. The mode of institution is for the presentee to kneel down before the bishop, whilst he reads words of institution out of a formal document.—*Johns.* 74; 1 *Inst.* 344a; 4 *Rep.* 79. An entry of this is made in the bishop's register, with particulars as to the patron and the presentee and other parties concerned.

by delivery of a key of the church-door, or of the bell-rope, whereby the bell may be tolled, or by some symbol of corporeal possession.¹ But before the profits can be obtained the first-fruits must be paid or compounded for.² After induction it is required by statute that the person inducted shall on the first Lord's Day, or other day appointed by the bishop, read the Thirty-nine Articles; and a failure to comply with this requisite involves forfeiture of the presentation.³

¹ Degge, P. I. c. 2. ² 26 Hen. VIII. c. 3, § 1; 1 Vic. c. 20.

³ 28 & 29 Vic. c. 122, § 7. A table of the fees to be taken in respect of the institution to livings, which formerly varied in each diocese, was authorised by statute in 1837.—1 & 2 Vic. c. 106, § 131.

A perpetual curate is put in possession of his benefice, without institution or induction, merely by a licence from the bishop.

CHAPTER V.

THE PROPERTY IN THE PARISH CHURCH AND INCUMBENT'S
RESIDENCE.

Parson's freehold estate in the church.—The parson of a parish when once instituted and inducted is deemed by the law to become seised of the freehold of the church for most purposes; and it is now necessary to notice the particulars of which this freehold consists, and the constituent parts of the church itself, and its interior fittings, for all these subjects are regulated either by the common law or by statutes. The nature of the property held by the priest of a parish must have been at first vaguely understood. Bracton, indeed, said that things sacred, religious, and hallowed, were not the property of any man, but the property of God, such as cups, crosses, censers, which it is forbidden to alienate except to redeem captives.¹ But such a theory of property obviously could not be acted on. The feudal relation which had then become well settled and understood as to other kinds of property suggested a species of tenure which was adapted to sacred subjects. Frankalmoigne was the kind of tenure proper to the church, being a commutation for military service, allowed to priests, who were excused from doing fealty to any lord—as Littleton said, “because divine service is better to them before God than doing of fealty.” And this tenure, though founded on the duty of saying masses, was held to be not changed by the substitution of performing divine service in accordance with the Prayer Book.² The nature of the incumbent's property was always treated as of a freehold character,

¹ Bract. b. i. c. 12.² Co. Litt. 95b.

though, as will be found, that freehold is subject to many peculiar restrictions which mark out the property of the clergy from secular possessions. The church itself was the most considerable part of the rector's official property, and there were things used in the church which have in modern times, as well as Reformation times, caused many disputes.

Consecration of churches.—The churches and chapels set apart for the celebration of divine service in the Church of England are all, except in the case of proprietary or subscription chapels, consecrated in the first instance, and if not so, most of them are at least licensed by the bishop. And one remarkable characteristic of the parish church is, that an ordained minister commits an ecclesiastical offence, if he celebrate public worship in other than consecrated or licensed buildings.¹ The consecration of a church seemed always to be treated as a notable fact in its history, though no particular form was used till about the fourth century, when unusual interest attended the ceremony. And Justinian's law declared, that no church was to be begun, till after the bishop had made a solemn prayer and fixed up the sign of the cross.² And still further, no church was to be built till security was given for its endowment.³ The notion of consecration naturally led to a punishment for desecration; and the charity feasts called *agapae* were forbidden by the Council of Laodicea to be held in churches.⁴ In the ninth century the consecration of a church seemed to be one of the chief duties of the bishop, and the name of the saint to whom it was dedicated was to be written on the altar, or the wall, or a table.⁵ This consecration of a church is deemed in the eye of the law not only essential but indelible. Hence difficulties have occurred as to whether this sanctity is lost by the church being rebuilt, or at least by being rebuilt, not entirely on the same lines. Formerly it was doubted sometimes, whether the rebuilding of a church, even within

¹ *Freeland v Neale*, 1 Rob. Ec. 643; *Barnes v Shore*, 1 Rob. Ec. 382; *Kitson v Drury*, 11 Jur. N. S. 272. In 1725 it was estimated that there were 9,284 churches for the service of the Church of England; in 1851 there were 14,077; in 1873 there were 15,758.

² Just. Nov. 131, c. 7.

³ Just. Nov. 67, c. 2; Anselm's Can.

⁴ Conc. Laodic. c. 28.

⁵ Wulf. Can. A.D. 816. 1 Will. 169

the same area, did not need reconsecration.¹ But that doubt was wholly put an end to; and now, whenever a church or chapel has been once consecrated and is rebuilt, no reconsecration is needed, whether the external walls have remained entire or the position of the communion table has been altered.² And not only must a church be consecrated, but the churchyard also.³ In cases, however, of additions to an existing churchyard, the consecration may be entirely effected by the bishop merely executing an instrument declaring it to be so.⁴ The rector's right to cut down the trees in the churchyard was restricted before the time of Edward I.⁵ This was in accordance with earliest notions, which treated the property as only an official life estate and nothing more. And the lay rector has the freehold in preference to the incumbent, who has it only for spiritual purposes.⁶

Repairs of church, and church rates.—While the freehold of the church and churchyard was deemed by the law to be vested in the rector, yet that this was little more than a name was proved, not merely by the restrictions already noticed as to selling and letting and burdening the property, but also by the incidence of the duty to repair, which in an ordinary freehold none other than the owner must discharge, if bound at all or inclined to do any repairs. One of the duties of the earliest order of bishops in this country was to set aside one fourth of his income for the repair of the church.⁷ And the like duty, after a diocese came to be subdivided into parishes, next devolved on the parish priest.⁸ It was in the tenth century still clearly the priest's duty, and his alone, to do the repairs.⁹ But in the eleventh century it began to be discovered, that it was the duty of all the parishioners, seeing that the church was for their common benefit.¹⁰ Coke says, that the canon law required the parson to repair the parish church, but the custom of the realm required the parishioners to undertake this duty, for the canon law did not bind the clergy.¹¹

¹ Parker v Leach, L. R., 1 Priv. C. 312. ² 30 & 31 Vic. c. 133, § 12. ³ Gibs. Cod. 190. ⁴ 30 & 31 Vic. c. 133, § 1.

⁵ 1 Stat. Realm, 211. ⁶ Greenslade v Derby, L. R., 3 Q. B. 421.

⁷ Pope Greg.'s Answ. A.D. 601; 1 Wilk. 18. ⁸ Ecgbright's Exc. A.D. 740. ⁹ Elfric, Can. A.D. 957. ¹⁰ Cnut, L. Eccl. A.D. 1018; Thorpe, 536. ¹¹ 2 Inst. 653.

And this, he says, was one of the instances in which the statutes of Henry VIII. made for the clergy instead of against them. In working out this law, however, the greatest difficulty arose in modern times, when dissenters began to reflect, that the church was no longer for their benefit or advantage. Thus, though the law declaring it to be the duty of the parishioners to repair the church was as old as Canute, yet in the statute of 31 Edward III. (*circumspecte agatis*), it was also declared to be a matter for the court Christian to enforce, and that such court must not be interfered with. This, in effect, meant, that the remedy was not by *mandamus*, but merely by interdict and excommunication; and as these last became, in course of time, idle and impotent, the only remedy given became thereby lost for ever.¹ The Ecclesiastical Court might single out one or two whose duty might be supposed to be clear, and punish them as contumacious by imprisonment; but how could they punish ten thousand inhabitant householders in the same way?² The abortive attempts of churchwardens to persuade the inhabitants in vestry assembled to agree to this voluntary tax, became so frequent and caused so much irritation in parishes, that the legislature in 1868 intervened, and altogether abolished for ever the compulsory payment by the whole inhabitants of these church-rates.³

Church bells, organ, and holy table.—Church bells seem not to have been in use before the time of Bede, in the seventh century.⁴ They are, however, referred to in the canons, as if deemed necessary to summon the congregation to church. The exclusive control over the bell is vested in the incumbent, and to ring it against his wish is an ecclesiastical offence which is punished usually with costs.⁵ Though music in church services was known from the earliest times, yet instrumental music and organs were not used till the thirteenth century.⁶ The organ is, however, not deemed one of the things necessary for the church, and hence the parishioners were not bound by the

¹ 159 Parl. Deb. (3) 641. ² Per L. Wensleydale, 151 Parl. Deb. (3), 850. ³ 31 & 32 Vic. c. 109. Some exceptions were made when the rate was made under a statute. ⁴ Bing. Chr. Ant. b. viii. c. 7. ⁵ Daunt v Crocker, L. R. 2 Eccl. 41. ⁶ Bing. Chr. Ant. b. viii. c. 7.

common law to provide one.¹ Nevertheless, a faculty to erect one, when it was provided by subscribers, as has been a frequent occurrence, was always readily granted, after which the parish, as a natural consequence, became bound to repair it during those days when church-rates were compulsory.² And when an organ is made part of the fabric, then the incumbent has the exclusive control over it; and the organist, though appointed and paid by the vestry, cannot set up his own views as to the music during divine service in opposition to such incumbent.³

In the primitive church, the altar and the Lord's table were convertible terms.⁴ But after the Reformation new views came to be entertained. And under the laws now regulating that subject, it is held, that in order to exclude idolatrous uses, the table must be made not of stone, and immovable, but of wood, and more or less movable.⁵ A credence-table, that is to say, a small side-table on which the bread and wine are placed before consecration, is also not illegal.⁶

Ornaments in churches.—The law relating to ornaments in churches has been for three centuries in a confused state. The doctrine relating to these ornaments has been arrived at after an examination of the state of things deemed legal in the time of Edward VI., for the rubric of the present Prayer Book, which is part of the statutory law, prescribed, "that such ornaments of the church and of the ministers should be retained as were in use by authority of parliament in the second year of Edward VI.;" in other words, according to the first Prayer Book of Edward VI. established in that year. And "ornaments," in this sense, have been interpreted to include vestments, books, cloths, chalices and patens, and other things mentioned in the various ecclesiastical constitutions.⁷ Some of these

¹ Pearce v Hughes, 3 Hagg. Eccl. 10. ² Jay v Webber, 3 Hagg. Eccl. 4; St. John's, Margate, 1 Hagg. Cons. 198. ³ Wyndham v Cole, 1 Prob. Div. 130. ⁴ Bing. Chr. Ant. b. viii. c. 6.

⁵ Faulkner v Lichfield, 1 Rob. Ecc. 184; Beal v Liddell, Moore Sp. Rep.

⁶ Westerton v Liddel, Moore Sp. Rep. A baldacchino or marble canopy supported on pillars over the communion table, and under which the celebrant priest may stand, has been treated as illegal.—White v Bowron, L. R. 4 Eccl. 207.

⁷ Lyndw. 251; 2 Phillim. Eccl. L. 929.

ornaments have been called inert, such as the holy table, pulpit, and reading desk; others are deemed active, such as incense, banners, torches, candles, which may be so used as to become part of some ceremony.¹ And in order to discover what inert ornaments were deemed legal, and in order to explain the words of the first Prayer Book of Edward VI., the courts have been obliged to look at many contemporary documents of a miscellaneous character before and after that date, such as historians usually consult, in order to arrive at that certainty which the law delights in, and is bound to discover in the end, however loose may be the materials from which it is deduced.² As to a cross or crucifix, this cannot be used as a part of a ceremony, as by placing it on the communion table, for such a usage is presumed to tend towards superstition.³ And it can neither be fixed to the table nor to a place near to the table; and yet, at a distance, such as five feet above, it may be unobjectionable.⁴ And it is equally illegal when made of metal and set upon the top of an iron screen-work at the entrance of the church, for that cannot be viewed as an architectural decoration.⁵ Again, if, for example, flowers arranged in certain outlines of figures are used inertly, and not ceremonially, it may make all the difference between legality and illegality.⁶ And decorations called stations of the cross hanging or fixed to the walls are illegal.⁷ A reredos erected in a cathedral for decoration, having sculptured decorations in high relief of the Ascension and kindred subjects, was recently deemed not illegal, being merely decorative, and not likely to give occasion to any idolatrous or superstitious practices.⁸

Monuments and tombs in church and churchyard.—As to monuments in a parish church, the permission of the incumbent as well as of the ordinary is required to authorize their erection or alteration. The freehold of the

¹ *Martin v Mackonochie*, L. R., 3 Priv. C. 52.

² *Westerton v Liddell*, Moore Sp. Rep. 157. An abuse was noticed in the matter of pictures in churches so early as the fourth century.—*Bing. Chr. Ant.* b. viii. c. 7.

³ *Westerton v Liddell*, Moore Sp. Rep.

⁴ *Ibid.*

⁵ *Clifton v*

Ridsdale, 1 Prob. Div. 316.

⁶ *Martin v Mackonochie*, L. R., 2 Priv. C. 387; *Elphinstone v Purchas*, L. R., 3 Eccl. 66, 107.

⁷ *Clifton v Ridsdale*, 1 Prob. Div. 321.

⁸ *Philpotts v Boyd*, L. R., 6 Priv. C. 435.

church being in the rector and not in the churchwardens, the consent of the latter is not sufficient authority in such a matter. And no lengthy period of consent or non-interference will have the effect of transferring this power to the churchwardens in their own right.¹ And a lay rector must also have the consent of the ordinary to approve a like erection.² Thus, when Sir F. Bury set up his arms in the church of St. David's, in Exeter, the bishop was held entitled to promote a suit to deface them, as being set up without his consent.³ But there is an appeal to the Arches Court against the exercise of the bishop's discretion.⁴

The doctrine that the freehold of the churchyard is in the rector has been pushed to the length of a censorship of inscriptions on the tombstones in the churchyard, and even requiring permission to set them there; though it is difficult to discover on what theory this power is founded. Any material alteration in the tombstones, as laying them flat instead of erect, has been usually allowed on application for a faculty, especially if a majority of the inhabitants agree.⁵ But the courts have sometimes been called upon to compel persons who erect tombstones in the parish churchyard to take care, that they say nothing implying a doctrine inconsistent with that of the thirty-nine articles. Hence, the executors of a Roman Catholic, who put on his tombstone the words "Pray for the soul of J. Woolfrey," only escaped being punished and made to pay the costs of a prosecution having for its object to erase those words, by the accident, that there was no such express or implied inconsistency to be found, after an elaborate examination of the thirty-nine articles and of the works of the divines of the Church of England.⁶ In 1794, when intolerance was part of the law of England, and before the repeal of the Test and Corporation Acts, and the Act of 1846, Lord Stowell pronounced a *dictum*, that no monument can be erected in the churchyard without leave of the ordinary, and that the ordinary or the rector could prohibit a tombstone.⁷ As, however, all dissenters must

¹ Beckwith v Harding, 1 B. & Ald. 508. ² Rich v Bushnell, 4 Hagg. Ecc. 164. ³ Palmer v Bp. Exeter, 1 Str. 575.

⁴ Curt v Marsh, 2 Str. 1080. ⁵ Sharpe v Hansard, 3 Hagg. Ecc. 336. ⁶ Brecks v Woolfrey, 1 Curt. 880. ⁷ Maidman v Malpas, 1 Consist. R. 208.

die, and refusal to bury them in the parish churchyard cannot be denied on any pretext, it seems to follow that the right to erect a tombstone is part of the right of burial, and cannot be left to the mere discretion of the rector, who is deemed the owner of the freehold not by way of restricting the general rights, but rather to advance them. In one case, this exclusive right of the bishop and rector to dictate to parishioners the inscriptions on their tombstones was pushed to the length of refusing permission to an inscription in which a Baptist minister was described under the prefix of "reverend." But this was held to be an interference of the incumbent and bishop altogether unjustifiable.¹

Sacrilege.—The offence of stealing and breaking into places of public worship is put on the same footing whether the house is a church of the Church of England, or of any sect. It is enough that the place be one for divine worship in the popular meaning of the term. Hence, whoever breaks and enters any of these places, and commits a felony therein, or being therein peaceably, then commits a felony, is liable to penal servitude.²

Duties of churchwardens as to fabric of church.—And here it is convenient to notice the powers and duties of churchwardens, who are compulsory officers appointed

¹ *Keet v Smith*, 1 Prob. D. 73. It has sometimes been hastily observed, that because a rector is deemed the freeholder of the churchyard, and has therefore as part of such right that of grazing sheep and cattle there, the burial of a dead person is a form of encroachment on that vested right of grazing, and that it requires a species of gift or sacrifice on the rector's part; whereas the contrary is obviously the rule of law. It has been too readily assumed, that it is still in the power of the rector to enforce his views of morality and religion on tombstones; but since the repeal of the Test and Corporation Acts, and the repeal of all religious disabilities in 1846, there seems now no foundation for any such doctrine in the existing law—9 & 10 Vic. c. 59. A dissenter's religion is now as agreeable to public policy and as much established and protected as that of the church. See *post*, Chap. IX.

² 24 & 25 Vic. c. 96, § 50. For life, or not less than five years, or for two years imprisonment.—27 & 28 Vic. c. 47.

Sacrilege has always been a crime punished severely, and viewed with detestation. Though Titus the Roman Emperor carried from Jerusalem in triumph the holy books, the seven-branched candlestick, the silver trumpets, and the veil of the temple, and kept them, they were ultimately returned by his successor more than 400 years afterwards, A.D. 520.—*Suet. Tit.*

annually, chiefly to assist in protecting and regulating the property in the parish church.¹ The churchwardens are charged with the custody of the sacred edifice, but are subject, nevertheless, to the directions of the incumbent, and hold possession subject to him.² Hence, if a churchwarden break into the church to do something which he thinks it his duty to do, he is nevertheless guilty of an ecclesiastical offence, for the keys belong to the incumbent.³ The leading duty of the churchwardens is to preserve decorum among the congregation. And if strangers intrude into private pews, the churchwardens have power to remove them, using no more force than is necessary; though they cannot detain and imprison such intruders for fear they should return.⁴ The same officers must keep the foot-paths and fences of the church, and also the churchyard in good repair.⁵ And the Ecclesiastical Court may issue against them a monition for not repairing them.⁶

The churchwardens' duty as to pews.—One leading duty of the churchwardens is that which relates to their regulation of the seats and pews. Their discretion as to the

¹ See 1 Pat. Com. (Pers.) 481. ² *Lee v Mathews*, 3 Hagg. Eccl. 173. ³ *Ritchings v Cordingly*, L. R., 3 Eccl. 113.

⁴ *Burton v Henson*, 10 M. & W. 105; *Worth v Terrington*, 13 M. & W. 781. It seems men and women used to sit in separate parts of the church in earliest times.—*Const. Apost.* b. ii. c. 57. One gate of the ancient church was called the Beautiful or Royal Gate, at which kings laid down their crowns before entering, as it was deemed indecent to carry such symbols of worldly distinction into a place where all ought to be sensible of equality.—*Leo Gram. Chronog.* 466. In eastern places of worship the shoes are taken off before entering. Churches in early centuries included courts and purlieus, and a prison for refractory clerks.—*Bing. Chr. Ant.* b. viii. c. 7. In England interludes and plays were long allowed in churches.—*2 Pike on Crime*, 618; *Roberts' Soc. Hist.* 37. And in the time of Elizabeth the people used to walk about and talk during divine service.—*1 Strype, Ann.* 522.

⁵ *Walter v Montague*, 1 Curt. 253.

⁶ *Millar v Palmer*, 1 Curt. 540; *Fielding v Standen*, 2 Curt. 663. The compulsory attendance of the laity at church was long deemed part of the business of the law.—5 & 6 Ed. VI. c. 1. But all pecuniary penalties for non-attendance were abolished in 1846.—9 & 10 Vic. c. 59. In 1839 a dissenter having been appointed churchwarden, though unable to raise money by a church-rate, and having no funds, was yet cited and punished with imprisonment by the Ecclesiastical Court for not providing wine and bread for the communion.

more detailed arrangements relating to pews and to seating the parishioners, being a practical matter requiring attention, is not to be controlled even by the incumbent, though it is liable to be reviewed by the ordinary.¹ Thus every housekeeper has a right to call upon the parish for a convenient seat, and if an inhabitant wants a pew, the churchwardens ought not to permit an occupancy by a non-inhabitant, nor permit prescriptive pews to be let, so as to prevent them meeting such demands.² The discretion of the churchwardens in this matter is subject to two restrictions. 1, There may be faculties appropriating certain pews to certain individuals in different terms, and with different limitations. These faculties can only now legally be granted to a man and his family so long as they continue inhabitants of a certain house in the parish, or at least continue inhabitants of that parish. 2, There may be a prescriptive right to a pew, which the common law recognises as derived from a faculty. The holders must show the annexation of the pews to the messuages time out of mind, and the reparation from time to time of such pews by the tenants of such houses or messuages. The chancel, indeed, may belong to a non-parishioner. But a parishioner cannot sell or rent his pew to another, after he himself has ceased to be an inhabitant. Nor can a prescriptive right to a pew be severed from the messuage to which it belongs.³ But though a faculty cannot now be

¹ *Fuller v Lane*, 2 Add. 419; *Byerly v Windus*, 5 B. & C. 1; *Wyllie v Mott*, 1 Hagg. Eccl. 28.

² *Ibid.* "By the general law and of common right, all the pews in a parish church are the common property of the parish. They are for the use in common of the parishioners, who are all entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens, as the officers and subject to the control of the ordinary. Neither the minister nor the vestry have any right whatever to interfere with the churchwarden in seating and arranging the parishioners, as is often erroneously supposed. The churchwardens are bound in particular not to accommodate the higher classes beyond their real wants to the exclusion of their poorer neighbours, who are equally entitled to accommodation with the rest; though they are not entitled to equal accommodation supposing the seats to be not all equally convenient."—*Sir J. Nichols*, *Fuller v Lane*, 2 Add. 426.

³ *Fuller v Lane*, 2 Add. 436.

granted for a pew to a non-parishioner, the latter may claim it by prescription.¹ And an inhabitant who has a pew assigned to him in a new district church is held to surrender his right to a pew in the parish church.²

An action at common law lies for perturbation of pew or disturbing the possession, as well as a suit in the ecclesiastical court. In attempting to establish this prescriptive right, it will be fatal, if the origin of the user is shown to commence within legal memory, as, for example, only forty years ago.³ The tenant of the messuage to which the pew is appurtenant can also claim possession.⁴ And when the messuage is subdivided, all the occupiers may claim to use the pew.⁵ And the possession must not only be proved to be in the predecessors of the person claiming, but all repairs necessary and alterations must be shown to have been also done by them exclusively.⁶

Miscellaneous functions of parish vestries.—Though the rector when once instituted has a freehold estate in the church and churchyard, subject to various restrictions, and though he is a corporation sole, yet he does not represent the parish or the inhabitants generally. The parish is not a corporation, and yet the inhabitants in vestry assembled are often empowered by statute to meet and decide upon various miscellaneous matters referred to them by different statutes, such as those relating to election of churchwardens, to highways, and the obsolete self-assessment to church-rates. These meetings used at common law to be held in the parish church, or rather in the room called the vestry, which gave its name to such meetings. Vestries had been so held in the parish church from time immemorial; but in 1850 the legislature authorised a separate building to be erected or hired for this use at the expense of the ratepayers. At that time a flagrant case of what was thought desecration had occurred in a disorderly meeting of the vestry at Shoreditch, which lasted so long that, the church being needed for evening service, the meeting had to be dispersed.⁷ And since that date some of these meetings

¹ *Lousley v Hayward*, 1 Y. & J. 583.

² 19 & 20 Vic. c. 104,

§ 5. ³ *Griffith v Mathews*, 5 T. R. 297.

⁴ *Parker v Leach*,

L. R., 1 Priv. C. 312.

⁵ *Harris v Drave*, 2 B. & Ad. 164.

⁶ *Crisp v Martin*, 2 Prob. & Eccl. Div. 15.

⁷ 75 Parl. Deb. (3)

1094.

are prohibited from being held in the church.¹ This meeting of the inhabitants in vestry assembled being usually in the church or part of it, led to the incumbent being present; and one duty, or rather privilege, belonged to the rector or vicar in all such meetings, which was, that he had the right to preside. This right was apparently not quite clear according to the common law.² But in 1818 a statute regulated such meetings; and while the churchwardens do most of the duty relating to giving notice, yet the minister's directions are superior to theirs if they differ from him.³ And the rector, vicar, or perpetual curate if present, is entitled to take the chair and has a casting vote. And by virtue of this position he regulates the proceedings, and if a poll is demanded he can appoint the time and place, subject always to a remedy by *mandamus*, if he fail to meet the convenience and justice of the case according to the business in hand.⁴ And on ordinary occasions the minister has the right to settle the order of business and appoint the hour of the meeting, seeing that such matters cannot be conveniently left to the meeting itself.⁵

Residence of clergy and repairs thereof.—When once an incumbent was instituted to the benefice his duty obliged him to remain and reside personally among the people. This duty was recognised by the laws of Justinian.⁶ The non-residence of a parochial clergyman was from the earliest times deemed a scandalous inconsistency, at variance with the spiritual vocation, and the Council of Trent sought to have the rule enforced.⁷ And it was for this reason that our own common law excused the clergy from being obliged to act as bailiffs, or filling secular offices which required their attention.⁸ The theory of the common law with reference to them thus came to be, that each incumbent of a parish church was deemed resident on his cure.⁹ And for a like reason he was entitled to a house

¹ 1 & 2 Will. IV. c. 60, § 29. In 1850 power was given to the ratepayers of parishes having more than a population of 2,000 to build or rent a building for holding vestry meetings, and to borrow the money and secure it on the rates.—13 & 14 Vic. c. 77.

² *Stoughton v Reynolds*, Cas. 1. Hardw. 274. ³ 58 Geo. III. c. 69. ⁴ *R. v D'Oyley*, 12 A. & E. 139. ⁵ *R. v Tottenham*, 4 Q. B. Div. 369. ⁶ Nov. 6, c. 2. ⁷ *Van Esp.* p. i. tit. 11. ⁸ 2 Inst. 625. ⁹ *Ibid.*

and glebe, called by the canon law a manse.¹ And no church could be regularly consecrated unless this condition were complied with. The common law on this subject was further enforced by the legislature. A statute of Henry VIII. made it compulsory under a penalty for the incumbent to live in the parish, and this law was only repealed in 1837.² Even the want of a parsonage-house was deemed no excuse for living out of the parish and for escaping the penalties of non-residence, because he must still reside at least in the parish;³ yet ill-health was held to be a valid excuse.⁴ The bishops also were entrusted with a power to license non-residents.⁵ But notwithstanding this theory, many churches were nevertheless in existence without any adequate residence, or without the means of repairing it. In 1777 it was felt to be a grievance that the clergy were induced to reside at a distance for want of proper habitations, by which means the parishioners lost the advantage of instruction and hospitality. Accordingly power was given to incumbents, whenever one year's income would not suffice to build or repair the residence, to borrow with the ordinary's consent a sum not exceeding two years' income, and mortgage the glebe, tithes, and profits for a period of twenty-five years.⁶

Governors of Queen Anne's bounty.—The governors of Queen Anne's bounty now assist the poorer clergy⁷ by

¹ Spelm. in verb. x. 3, 39, 1; Lind. 254; Gibs. 661. So called in Scotland to this day. ² 21 Hen. VIII. c. 13; 1 & 2 Vic. c. 106.

³ Wilkinson v Allott, Cowp. 429. ⁴ Scammell v Willett, 3 Esp. 29. ⁵ Lindw. 132.

⁶ 17 Geo. III. c. 53. If the benefice did not exceed in value 100*l.*, the bishop might also with the patron's consent mortgage the glebe, tithes, and profits, in which case the incumbent had to pay the interest.—17 Geo. III., 53, § 8. In cases of benefices worth more than 100*l.*, the bishop might nominate four benefited clergymen to examine and report, and raise money by mortgage in like manner.—1 & 2 Vic. c. 106, § 62. And a similar power of borrowing on mortgage is extended for the acquisition of twelve acres of land contiguous to the parsonage, and to build stables or outbuildings, and fences.—28 & 29 Vic. c. 69. But the consent of the bishop and patron is required, and the maximum of the loan is defined. The mode of repaying the borrowed money is also set forth in statutes 17 Geo. III. c. 53, §§ 3, 6, 7; 1 & 2 Vic. c. 106, § 65.

In 1836 there were 10,553 benefices, of which 2,878 had no residences, and of which 1,728 had no fit residences.

⁷ The tenth part of the income of the clergy in the time of

advances for the purpose of improving their residences.¹ And the colleges in Oxford and Cambridge are authorised by statute to employ their moneys for like objects.² And the wishes of charitable persons disposed to make gifts of land or money for the purpose are facilitated by statute.³ And the residences of deans, canons, and bishops, may be altered and disposed of in various ways, under the authority of express provisions of like statutes.⁴

Licence for non-residence.—The powers of bishops to dispense with residence, which under the canon law had been left vague and shadowy, were curtailed by statute; and now they can only grant their licences under certain conditions, and on being made acquainted with the whole particulars.⁵ And in a few cases the further consent of the archbishop must be obtained, and the archbishop may be appealed to if the bishop refuses the licence in the cases enumerated.⁶ And to meet extraordinary circumstances, the bishop and archbishop may together grant a licence in cases not enumerated in the statute.⁷ In 1837 greater uniformity was enforced by means of a statute as regards non-residence, and minute rules were laid down.⁸ If the incumbent absent himself more than three months in one year without having a licence or exemption, he forfeits part of the annual value of his benefice.⁹

Hen. III. had been granted to the Pope. The first fruits of vacant benefices obtained from Edw. I. were also given to the Pope. At the Reformation Hen. VIII. transferred these funds to himself. Queen Anne gave up the funds to form a fund to increase small benefices.—2 & 3 Anne, c. 11. The governors of Queen Anne's bounty now distribute about 10,000*l.* a year, and the House of Commons from time to time has voted public money to aid this fund.

¹ 17 Geo. III. c. 53, § 16; 1 & 2 Vic. c. 23, §§ 4, 72.

² 17 Geo. III. c. 53, § 13; 1 & 2 Vic. c. 23, § 5.

³ 43 Geo. III. c. 108; 51 Geo. III. c. 115; 28 & 29 Vic. c. 69.

⁴ 3 & 4 Vic. c. 113, § 59; 4 & 5 Vic. c. 39; 5 & 6 Vic. cc. 26, 27.

⁵ 1 & 2 Vic. c. 106, §§ 42-44.

⁶ *Ibid.*

⁷ *Ibid.* § 44.

⁸ 1 & 2 Vic. c. 106.

⁹ *Ibid.* § 32. A good ground for obtaining a licence is, that there is no fit house of residence, but even with a licence he must live within a distance of two or three miles.—1 & 2 Vic. c. 106, § 33. And deans, professors at universities, and certain chaplains, had greater liberty allowed to them.—*Ibid.* § 38. And no licence for non-residence continues in force for more than two years.—1 & 2 Vic. c. 106, § 46, though it is not affected by the death of the bishop who granted it. And he or his successor may revoke it after

Dilapidations in ecclesiastical property.—Ecclesiastical property differs from other property, not merely in this, that it can neither be sold, nor alienated, nor burdened,¹ these three disqualifications making it in reality nothing else but the official residence for the time being of each successive rector, vicar, dean, bishop, or others who hold office in the church; but the law of waste has always been deemed so serious, that it used to be formerly treated as a criminal offence in the ecclesiastical courts. So that while other tenants for life at most were liable to injunction and action for damages, the spiritual incumbent was treated as a criminal, and might be deprived of his estate, such as it is, whenever he allowed dilapidations, this being the technical description of legal waste when applied to their property. And though nobody could suppose that such a matter had anything spiritual in it, yet the ecclesiastical courts long claimed the exclusive jurisdiction, and entertained suits for dilapidations which the temporal courts would not interfere with, by prohibition or otherwise. After a long interval the temporal courts also allowed an action on the case at law for the same matter. This alternative remedy of an action at law was treated as somewhat doubtful before 1690, but then became settled.²

Obligation to keep in repair clergy houses.—The incumbent is under an obligation to keep the buildings in

due notice.—*Ibid.* §§ 48, 49. And a list of all licences in force, and their revocations, is kept in the Registry of the diocese for inspection of all persons on payment of a small fee, and a copy is sent to the churchwardens of the parish.—*Ibid.* §§ 50, 51. And to keep a short account of the residence of the clergy, each incumbent is bound annually to supply the particulars relating to his parish in answer to a circular of the bishop.—*Ibid.* § 52. At the death of the incumbent the widow is allowed to remain for two months in occupation of the house of residence and garden, if any.—1 & 2 Vic. c. 106, § 36.

¹ As a general rule, no ecclesiastical benefice can be sold by the incumbent, and when this is allowed it is only under rare conditions expressly defined by statutes. Nor is it competent for an incumbent to mortgage or charge his benefice, for this would be to put in jeopardy the spiritual duties which are inseparable accompaniments of the possession.—13 Eliz. c. 20; *Skrine v Hewett*, 1 A. & E. 812. But for one or two purposes strictly advantageous to the benefice a power to charge is given.—1 & 2 Vic. c. 106, § 62.

² *Jones v Hill*, 3 Lev. 268; *Radcliffe v D'Oyley*, 2 T. R. 637.

repair, and he cannot escape liability on the ground that his predecessor left the same dilapidated; and the executors of each succeeding incumbent during this state of dilapidation are liable in an action to his successor.¹ And even a sequestrator cannot escape a like liability, for this is one of the expenses which he ought to provide for, though after the sequestration is closed his liability ceases.² And on an exchange of livings it will be presumed that each will be liable to the other for dilapidations,³ unless they agree not to claim such.⁴ Should the incumbent notwithstanding these restrictions sell timber or let mines in his glebe, he will be ordered to invest the moneys for the benefit of the living.⁵ The kind of repairs which an incumbent is thus bound to do is such as will keep the premises in substantial repair as distinguished from mere ornamentation.⁶ Another peculiarity of ecclesiastical benefices is, that, if the incumbent makes great alterations, he ought to provide himself first with a faculty, that is to say, the bishop's approval, though this is not necessary if, for example, new buildings of a better kind are substituted for old ones.⁷ And, like other tenants, he or his executors may in a reasonable time remove any fixtures which he may have put up.⁸ The ecclesiastical tenant for life is at common law prohibited from felling wood except for the necessary repairs of the building;⁹ or from opening new mines or gravel-pits without the consent of the patron and ordinary.¹⁰ In some cases prohibition or an injunction to the bishop or parson may be issued from the high court, though not at the suit of an uninterested person.¹¹

¹ *Bunbury v Hewson*, 3 Exch. 558.

² *Hubbard v Beckford*, 1 Hagg. Cons. 307; *Whinfield v Watkins*, 2 Phillim. 8. This law as to executors of successive incumbents being liable was extended to Wales in 1535.—27 Hen. VIII. c. 26.

³ *Downes v Craig*, 9 M. & W. 166. ⁴ *Goldham v Edwards*, 17 C. B. 141. ⁵ *Sowerby v Fryer*, L. R., 8 Eq. 417. ⁶ *Wise v Metcalfe*, 10 B. & C. 299. ⁷ *Huntley v Russell*, 13 Q. B. 572.

⁸ *Martin v Roe*, 7 E. & B. 237. ⁹ *Sowerby v Fryer*, L. R., 8 Eq. 417. ¹⁰ *Holden v Weekes*, 1 J. & H. 278.

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And perpetual curates are on the same footing as ordinary incumbents in this respect;¹ and even vicars-choral, when they have a residence house by virtue of their office.² It was once thought that a succeeding incumbent might in all cases sue the executors of his predecessor for the waste already described; but this remedy is confined to dilapidations in houses and buildings.³

Modern remedy for dilapidations.—In order that greater uniformity may prevail as regards these dilapidations, and especially the mode of proceeding, two very recent enactments were passed.⁴ A surveyor is to be appointed for each diocese, under the control of the bishop, and whose fees and charges are fixed by the bishop, the archdeacons, rural deans, and chancellor.⁵ And a systematic inspection and report are made whenever any vacancy occurs.⁶ Every incumbent of a benefice is also bound to insure the buildings of the benefice against fire, and also the chancel of the church in those cases where the incumbent is liable to repair it.⁷ There are also kindred provisions as to houses of residence of the higher clergy, and as to endowments assigned, and as to vacant benefices.⁸

Letting and alienation of clergy houses.—At common law a parson was deemed to have power, with the patron's and ordinary's consent, to grant leases of the Church property for lives or for years.⁹ And consents of those interested were required as regards bishops, archbishops, archdeacons, prebendaries, together with precautions being taken for the benefit of divine service.¹⁰ In 1540 it was

¹ *Mason v Lambert*, 12 Q. B. 795. ² *Gleaves v Parfitt*, 7 C. B., N. S. 838. ³ *Ross v Adcock*, L. R., 3 C. P. 655. ⁴ 34 & 35 Vic. c. 43; 35 & 36 Vic. c. 96. ⁵ 34 & 35 Vic. c. 43, § 10.

⁶ *Ibid.* § 29.

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⁸ 23 & 24 Vic. c. 124, § 9; 29 & 30 Vic. c. 111, § 12; 34 & 35 Vic. c. 43, §§ 25-32. ⁹ 1 Inst. 44. ¹⁰ *Gibs.* 744.

repair, and he cannot escape liability on the ground that his predecessor left the same dilapidated; and the executors of each succeeding incumbent during this state of dilapidation are liable in an action to his successor.¹ And even a sequestrator cannot escape a like liability, for this is one of the expenses which he ought to provide for, though after the sequestration is closed his liability ceases.² And on an exchange of livings it will be presumed that each will be liable to the other for dilapidations,³ unless they agree not to claim such.⁴ Should the incumbent notwithstanding these restrictions sell timber or let mines in his glebe, he will be ordered to invest the moneys for the benefit of the living.⁵ The kind of repairs which an incumbent is thus bound to do is such as will keep the premises in substantial repair as distinguished from mere ornamentation.⁶ Another peculiarity of ecclesiastical benefices is, that, if the incumbent makes great alterations, he ought to provide himself first with a faculty, that is to say, the bishop's approval, though this is not necessary if, for example, new buildings of a better kind are substituted for old ones.⁷ And, like other tenants, he or his executors may in a reasonable time remove any fixtures which he may have put up.⁸ The ecclesiastical tenant for life is at common law prohibited from felling wood except for the necessary repairs of the building;⁹ or from opening new mines or gravel-pits without the consent of the patron and ordinary.¹⁰ In some cases prohibition or an injunction to the bishop or parson may be issued from the high court, though not at the suit of an uninterested person.¹¹

¹ *Bunbury v Hewson*, 3 Exch. 558.

² *Hubbard v Beckford*, 1 Hagg. Cons. 307; *Whinfield v Watkins*, 2 Phillim. 8. This law as to executors of successive incumbents being liable was extended to Wales in 1535.—27 Hen. VIII. c. 26.

³ *Downes v Craig*, 9 M. & W. 166. ⁴ *Goldham v Edwards*, 17 C. B. 141. ⁵ *Sowerby v Fryer*, L. R., 8 Eq. 417. ⁶ *Wise v Metcalfe*, 10 B. & C. 299. ⁷ *Huntley v Russell*, 13 Q. B. 572.

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deemed better to pass an Act to enable bishops and other sole corporations, except parsons and vicars, to grant leases for twenty-one years or three lives without confirmation from any others.¹ And statutes of Elizabeth, followed up to recent times, further qualified the power of ecclesiastical persons both by enabling and disabling them in various particulars.² Statutes also enabled exchanges to be made of parsonage-houses and glebe-lands, and annexing houses and glebe, or adapting or repairing them.³ By modern statutes any incumbent may by deed, with consent of the patron and bishop, let his glebe and out-buildings for fourteen years, payable quarterly; and the lessee must covenant to pay taxes and other stringent covenants.⁴ This power, moreover, is merely an addition to all rights formerly possessed.⁵ And all ecclesiastical corporations, aggregate or sole, may with consent of the Ecclesiastical Commissioners and the patron grant building leases in possession not exceeding ninety-nine years, and subject to covenants.⁶ And mining leases and licences and easements may also be granted in the same way.⁷ The benefit of the increased rents accrues chiefly to the Ecclesiastical Commissioners, subject to certain minimum allowances in favour of the benefices;⁸ but houses of residence are not allowed to be leased.⁹

Pluralities in ecclesiastical livings.—Another incident which is incompatible with the rule of residence is that of pluralities, where one incumbent holds two or more livings situated at such a distance apart, that residence in both or all is impracticable. Pluralities were forbidden by the Council of Chalcedon in 415.¹⁰ For a like reason the Council of Lateran, held in 1215, made a rule, that the mere acceptance of a second benefice was *ipso jure* void, or at least the incumbent must elect one or the other.¹¹ It is true a licence or dispensation to hold more benefices than one was obtainable under the canons of 1603, from

¹ 32 Hen. VIII. c. 28. ² 1 Eliz. c. 19, &c.; 1 & 2 Geo. IV. c. 23; 6 & 7 Will. IV. c. 20; Ibid. c. 115, § 31. ³ 17 Geo. III. c. 53, &c.; 34 & 35 Vic. c. 43. ⁴ 5 & 6 Vic. c. 27, § 1. ⁵ Green v Jenkins, 1 De G., F. & J. 454. ⁶ 5 & 6 Vic. 108. ⁷ Ibid. § 4. ⁸ Ibid. §§ 10-13; 21 & 22 Vic. c. 57. ⁹ 5 & 6 Vic. c. 27, § 2; Ibid. c. 108, § 9. ¹⁰ Conc. Chalc. c. 10; Cod. Just. b. i. tit. 3. ¹¹ Gibs. 903.

the bishop: but it was to be allowed only to those who were worthy for learning.¹ And a minimum residence of two months was required,² and a licensed preacher must be maintained besides.³ The law as to pluralities is now, however, governed entirely by two modern statutes.⁴ No spiritual person can hold more than two benefices, or more than one benefice and one cathedral preferment, and no person holding any preferment in one cathedral or collegiate church shall hold therewith any preferment in any other cathedral or collegiate church.⁵ And these words, "cathedral preferment and benefice," are defined by the statute.⁶ When another preferment or benefice is accepted without complying with the statute, the former is vacated and forfeited as if the holder were dead.⁷

Union of benefices.—The union of small and contiguous benefices was allowed by the common law, if the bishop, patron, and incumbents agreed.⁸ And statutes, the two first of which are since repealed, further recognised and facilitated the practice.⁹ The modern statutes regulating the union of churches were passed in and after 1837, and defined the maximum of population and yearly value proper in such unions.¹⁰ And the consequences of the union are

¹ Can. 1603, § 41. ² Gibs. 910.

³ Can. 47. At one time the Crown could dispense with this canon, but, it was said, the Bill of Rights abolished this dispensing power.—1 Will. III. Sess. 2, c. 2; Gibs. 911.

⁴ 1 & 2 Vic. c. 106; 13 & 14 Vic. c. 98. ⁵ 1 & 2 Vic. c. 106, § 2. ⁶ Ibid. § 124.

⁷ 1 & 2 Vic. c. 106, § 11. And though two benefices may be held together, yet there must not be more than three miles between the two churches, and the annual value of one must not exceed 100*l.* computed in a way pointed out by the statute.—13 & 14 Vic. c. 98, § 1; 1 & 2 Vic. c. 106, § 129; Ibid. § 7. And there is also a limit as regards the population.—13 & 14 Vic. c. 98, § 2; 1 & 2 Vic. c. 106, § 130. And the archbishop's licence, founded on various written particulars, is also required, and on his refusal there is an appeal to the Queen in Council.—Ibid. § 6. Some further qualifications affect deans and heads of colleges in the universities.—13 & 14 Vic. c. 98, § 5.

⁸ R. v. Archbp. Armagh, 1 Str. 516. ⁹ 37 Hen. VIII. c. 21; 17 Ch. II. c. 3; 4 Will. III. c. 12. ¹⁰ 1 & 2 Vic. c. 106, § 16; 3 & 4 Vic. c. 113; 4 & 5 Vic. c. 39; 13 & 14 Vic. c. 98, § 8; 34 & 35 Vic. c. 90.

also set forth in some detail.¹ And conversely statutory power has in modern times been given to bishops or archbishops to institute proceedings for disuniting benefices formerly united, and which have too large a population, or when other circumstances make it desirable.²

¹ A separate Act regulates union of benefices in the metropolis.—
23 & 24 Vic. c. 142.

² 1 & 2 Vic. c. 106, § 21.

CHAPTER VI.

MAINTENANCE OF THE CLERGY AND THEIR TITHES.

Origin of tithe and its development as a tax.—While parish churches had their origin in the enthusiasm or piety or less praiseworthy motives of lords of manors, it was not enough that a piece of land and also a church should be given up or dedicated to sacred uses, unless the permanent services could be secured of a priest to carry on these uses for ever. And this meant nothing less than finding an income for the priest, whereby he may live like his neighbours. Incomes which are capable of being enjoyed as regularly as the seasons revolve, and as quarter-days approach, could in early times only be got by fits of entreaty or threatening, and by a kind of provisional and hand-to-mouth arrangement. It may be conjectured, that though many donors could give a piece of land, still they could not, or would not, give more; and so they left it to others to assist in building the church, and after the church was secured they might still be unable to find an income to the priest. And all degrees of generosity, and ability, and inability, may be assumed then to have existed at each stage, as we find them to exist in modern times on like occasions. It is impossible to assume that every donor of a church either had the means or the will to burden his lands with a perpetual payment by way of income, and none of the accompanying facts allow any such assumption. What really happened was, that at first the priest depended for his income on the offerings of his flock, and these were obtained without method or regularity, and without his having any hold whatever on the surrounding lands. All were at first mere personal alms, just as many centuries later

was the case, when a poor-law was about to be established.¹ We have seen that in the reigns of Henry VIII. and Elizabeth, when it first dawned on the legislature, that every person, however poor, had the right to live, and that some provision of a permanent kind must be made for him, there was at first and for a long time nothing more defined than a system of begging, and exhorting the wealthy to contribute.² Then when exhortation was unavailing, the churchwardens were told to go round and ask each person on the spot for a fair contribution, and enter the same in a book. And when this personal house-to-house visitation became also unavailing, though followed by a lecture from the bishop, then at last it came to be declared by the legislature to be a regular debt, tax, or rate, which all must pay, and which was fixed on a certain scale and recoverable by distress of goods. The same process had been followed in the case of tithes, which is the oldest, and indeed the only tax known to the common law, and which that law adopted, accepted, recognised, and enforced. It was a species of rude income-tax, and had all the defects which such a tax could have in modern eyes. It had gross inequalities, which the legislature had from time to time to redress. It had the glaring defect of harassing and exasperating the tax-payers, instead of being framed on the principle of inducing people to give up part of their property voluntarily, but if not voluntarily, then compulsorily, yet always with the least possible irritation, and sometimes without even letting them know and feel that they were paying it. This tithe or tax for support of the clergy failed most conspicuously in its mode of collection as well as of assessment, for the clergy practically assessed and collected their own tax, and were their own bailiffs; and thus came into collision with the struggling poor in odious ways which modern skill and experience would have taught them to avoid. The tax was from the first levied without that insight into human nature, which, perhaps, only time and the experience of centuries can give and are supposed to have given in other cases.

Tithe as a tax enforced by legislative power.—Though tithe was a tax which the common law may be said to

¹ In Egypt the priesthood had a real property in one-third of the whole territory.—*Prichard, Eg. Myth.* 409.

² See 2 Pat. Com. (Pers.) 16.

have treated as rightfully due, yet in reality it was owing to legislative authority, in precisely the same way as we now derive modern taxes from that source, though now always in more express language. The common law in the early centuries consisted, as we have seen,¹ merely of maxims of wisdom adopted from the old codes then current and from the wisest men of the times; and the clergy and their solemn synods being recognised as the most learned and wise during many ages, their views and maxims were largely absorbed and acted on by the courts, and by those councils and royal ordinances which then represented what we now call the legislature. In this way a law of tithes, which would now be called a rate or tax, became part and parcel of the common law; and the clergy took care to give to it the specious name of a divine right, which for ages prevented the legislature from disturbing or questioning it. But when in the time of Henry VIII. and his immediate successors, the art of printing and the Reformation made men think for themselves, and the people began to consider what was the object of taxes, and how far they corresponded with the benefits received, and whether they were capable of improvement, the legislature saw and removed many anomalies, and made the tax more universal and impartial. So that in reality the tithe law or tax did for the clergy the same as the Poor law did many centuries later for the rest of the population. It was reasonable and inevitable that those members of a profession set apart to definite duties, and looked upon as everybody's friends, and the nature of whose duties prevented them supporting themselves, should be enabled to live, and they had a right to live at the expense of their contemporaries. It is true that it was reserved for the times of Elizabeth to discover a still more general law, namely, a Poor law, which was founded on this indisputable first principle, that even the poorest of the poor have also a right to live at the expense of their contemporaries, if they have no means of their own to support themselves. And though at first the whole of the law of tithes was contained in a few general words, namely, that one-tenth of the produce of the land was to be given

¹ See 1 Pat. Com. (Pers.) 187.

to the clergy for certain definite purposes, one of which was their maintenance, this ceased to be sufficiently comprehensive, when trades and employments not immediately connected with land increased. The same law, therefore, was easily extended to the tenth of the yearly gains of all artisans and manufacturers and traders. This was laid down as the rule in Winchelsea's Constitutions in the time of Edward II. or rather under Edward the Confessor, and was more emphatically declared by a statute of Edward VI., which exempted few except day labourers from giving up the tenth of their earnings for the support of the clergy.¹ The rule, indeed, was incorporated into the common law at an age so early, that its beginning can scarcely be traced, namely, that all lands and occupations are *prima facie* liable to yield tithe, and it lay on those claiming exemption to prove how such exemption arose.² But the remote origin and imposition of the tax does not affect its substance, which always has continued undistinguishable from other taxes. All the rest was natural development from the primary rule adopted by the courts, temporal and spiritual. Though no statute is so old as to show its beginning, yet such a law could only originate, as all the main rules of the common law did also, either in some declaration made by those kings, and nobles, and clergy, who represented the legislature of their day, or in the universal acquiescence of the people acknowledging and instinctively following such rules, and thereby giving them the same effect as if these had been promulgated by statute. In this way the law of tithes covered the whole land of the kingdom, with a few trifling exceptions. It was a tax which reached every kind of income, and nothing but a legislature or its equivalent could establish a law so universal and so uniformly enforced, and so difficult to resist.

Origin of appropriations of tithes.—At the time that

¹ 2 & 3 Ed. VI. c. 13.

² Though potatoes and turnips were introduced into England since the statute of Edward VI. the courts held these crops were tithable on the general principle of being the fruits of the land. Hops were not cultivated for their present purpose till Elizabeth's time; they were also held to be tithable. So as to turkeys. Special statutes regulated the tithe of hemp and flax at a certain sum per acre.—3 W. & M. c. 3; 11 W. & M. c. 16; 1 Geo. I. st. 2, c. 26.

parochial priests became settled as formerly mentioned, there were some leading notions then current which affected their position, and at least account for many conditions which afterwards appeared somewhat anomalous. And these anomalies show, that however powerful the councils of the church were, they could not produce unanimity. One notion was, that the proprietor of lands was entitled to choose his parish church and pay tithes to that one which best suited him, or even to pay them to a neighbouring religious house, for it was treated by the courts as enough, that he settled with one or other of these representatives of the church. Another notion was, inasmuch as the proceeds of the tithes were by a universal custom divisible into four and afterwards into three parts, one of which only was for the personal support of the priest, the other two being for the repair of the church and the support of the poor, it was reasonable that the patrons, if they chose, might themselves see to the last two uses, which they could see to as well as the priest. And so they appropriated those shares to themselves, undertaking to bestow them according to custom. But they soon began to use them as their own exclusive and absolute property, or made a gift of them to some religious college or monastery, and the advowson of the benefice also, on the understanding that the donees would see to the like application of the fund. The monasteries thus became possessed of many advowsons, and sent some of their prebendaries or prevailed on some of the monks to take orders and serve the benefices themselves.

Distinction of parsons into rectors and vicars as regards tithes.—The abbot or prior of the religious house, thus taking advantage of his opportunity, farmed the advowsons, and often treated the clergy who did the priestly work as vassals or slaves. Within 300 years after the Conquest, it was estimated that about one third and those the richest benefices, had become the property of these religious houses. The priest was responsible to the bishop for the cure of souls, and responsible for the profits to the abbot or prior. But as the religious houses often sent out only a monk to do the spiritual duty who was idle and careless, the bishops remonstrated, and insisted on their employing a regular priest, who came to be

called a perpetual vicar or curate, with a proper salary, such vicar to be appointed by the bishop. In this way the vicar came to be the parson, and stood towards the bishop in the same relative position as the rector, who was appointed by the patron, stood towards his bishop, the latter being the ecclesiastical superior of both. The appropriations to a religious house were said to convey the interest both temporal and spiritual, while there were also some appropriations to laymen where the temporal interests only were conveyed, while the cure of souls resided in an endowed perpetual vicar.¹ In time these appropriations came to be so glaring an abuse that it was expressly enacted by statute, that the vicar of a church appropriated should be sufficiently endowed.² One of the incidents of an appropriation of a benefice was, that a pension was reserved to the bishop, payable by the religious body to whom the appropriation was made, this pension being an indemnity for the loss of profits during the vacation of the benefice; for as a corporation never died, this recurring perquisite was necessarily cut off.³

The parson or rector in modern times may thus be either lay or spiritual. The rector who made the endowment of the vicar was deemed in the eye of the law the patron, though the patronage may also be appendant to the manor from which the endowment originally was derived.⁴ The endowments of a vicarage are now ascertained mostly by prescription, the origin being seldom clearly traced.⁵ And courts of law have the jurisdiction to decide upon all the compositions set up in lieu of them; though if both rector and vicar are spiritual persons, the Ecclesiastical Court could entertain their disputes.⁶ One distinction is observable, namely, that in cases where the rector is a layman, though the freehold of the church is in him, yet the right of possession to the church belongs to the vicar and his churchwardens; and hence they are entitled to break open

¹ *D. Portland v Bingham*, 1 Consist. 162. ² *Rot. Parl.* 15 Rich II. 138; Stat. 15 Rich. II. c. 6; 4 Hen. IV. c. 12.

³ *Gibs*, 719. ⁴ *D. Portland v Bingham*, 1 Consist. 162.

⁵ *Imman v Wharmby*, 1 Y. & J. 545.

⁶ *Cheeseman v Hoby*, Willes, 680. In 1875 it was said there were 3,687 vicarages, 5,098 rectories, and 2,970 benefices neither rectorial nor vicarial.

a door leading from the churchyard into the chancel in order to complete this possession.¹ One peculiarity of vicarages was, as already stated, that the ordinary had power to compel spiritual impropiators to augment them.² But after the dissolution of monasteries and regrants to laymen, this obligation was extinguished, and the impropriation is on the footing of ordinary inheritances. The courts said it was now only the same obligation in this respect against the parson as against a layman.³

Common law relating to tithe.—A vast variety of learning has been brought to bear on the question at what date the tax called tithe was first imposed on proprietors of lands in England, and next on nearly all trades and occupations which had little or nothing to do with land.⁴

¹ *Griffin v Dighton*, 5 B. & S. 93. ² 15 Rich. II. c. 6; 4 Hen. IV. c. 12.

³ 2 Ventr. 35. But powers more or less voluntary and enabling have been given by statute for these augmentations.—29 Ch. II. c. 8; 12 Anne, c. 4; 1 & 2 Will. IV. c. 45; 6 & 7 Vic. c. 37; 28 & 29 Vic. c. 42; 29 & 30 Vic. c. 111, § 22. And means have been provided for converting vicarages into rectories through the medium of certain ecclesiastical commissioners.—3 Geo. IV. c. 72. In those cases where the incumbent of a modern ecclesiastical district is entitled to the fees for marriages and baptisms, and to discharge the duties, he is entitled to the designation of vicar.—31 & 32 Vic. c. 117, § 2.

⁴ The ancient notion was, that tithes were of divine right, and were merely unnecessary during the apostolic age, because the doctrine of community of goods then prevailed. When the church became more powerful in the fourth century, and governors were eager to show their zeal, then tithes, or something like it, were paid to the clergy.—*Selden's Hist. Tithes*, c. 5. In 895 a council of Tribus near Mayence boldly laid it down as the voice of God, that the tenth of all things was for the maintenance of the church and its ministers.—6 *Act. Concil.* P. I. p. 443; 2 *Ranke's Hist. Fr.* 182. The payment of tithe had been first required by a canon of a Provincial Council at Maçon, in France, in 586.—*Selden*, c. 5, § 1. And Charlemagne was said to be the first who enforced it in 780.—*Selden*, c. 5, § 2; 1 *Hallam, Mid. Ag.* c. 7. The practice prevailed in England in the eighth century, and the amount was settled as one-tenth of the income; one-third being devoted to the poor, one-third to the ornament of the church, and the remaining third to the priest for his own use.—*Ecgbright's Exc.* A.D. 740; *Selden*, c. 8, § 1. But it was treated as a voluntary payment till King Ethelstan made it compulsory.—*Ethelst. L. Eccl.* A.D. 925; *Thorpe*, 83. It has been said that the law of Offa, a friend of Charlemagne in 794, first gave to the clergy in England a civil right in all the land of the

But this research is of little importance, for the moment the general rule was accepted, acted on, and enforced by the common law, and at a time when the legislature was still in a rudimentary condition, it was precisely the same as if the legislature had invented and imposed it for the first time. Many maxims and elementary rules of common law cannot be traced to any existing statute, simply because the common law was formed by taking up some generally accepted truth current at the time and enforcing it long before our series of statutes begin. Therefore, from whatever quarter—whether the voice of a king or of a council of the Church—the common law appropriated the general rule or maxim, that all real property, and all trades and occupations, were bound to yield a tenth of their produce or earnings for the support of the clergy, this was as good as any statute, and had precisely the same binding authority. And if the rule of the common law was first in the field, all subsequent statutes must be so interpreted as not to supersede or displace it without express words or necessary implication. And as nothing but legislative authority, by whatever name known—whether called common law or statute law—could lay down and enforce a universal rule of that kind, all speculations as to the precise moment it first assumed the certainty of a fixed law are somewhat superfluous. It is enough, that all the wise men of the time thought this was, or ought to be, law,

kingdom of Mercia as a species of property, and that Ethelwulph, sixty years later, extended the same law to the rest of England. And though it has been doubted whether this referred to a gift of the land or of the produce, it is of little importance, if the clergy and leading men interpreted it as a creation of a legal right.—*Prideaux, Tithes*, 167; 2 *Hallam, Mid. Ag.* c. 7; 1 *Collier*, 156; 1 *Turner, Ang.-Sax.* 489. At least from the ninth to the twelfth century payment was enforced by the courts like any other legal right.—3 *Selden, Tithes*, 1108. Thus Edgar, in 967, and Ethelred, in 1008, made a law, that if the tenth part was not paid, the owner was to forfeit the eight parts and keep only one ninth to himself.—1 *Spelman*, 420 (*Brompton Chronicle*.) The laws of William the Conqueror, re-enacting those of Edward the Confessor, go into some detail as to the tenth sheaf, and calf, and lamb, the tenth of butter and of bees, and the tenth part of fisheries, and mills, and orchards, “and of *trade*, and of all things which the Lord shall give,” and the owner was declared to be bound to pay this tithe.—*Hoveden's Annals*, 1 *Spelm.* 620.

and then and there they, having the power, made it the law. And it is not wonderful that they should have called it a divine law, for men and courts equally believed at the same epoch that all other laws also had a divine origin,¹ though probably, owing to the produce of the law of tithes being used for the support of the clergy, they may have thought this as the most divine of all divine laws. And yet when the Quaker Bill was debated in Parliament in 1736, all the statesmen of the time agreed, that there was nothing more divine in the law of tithes than any other law, and declined to support such law on the theory of any such divine right.²

Presumptions of common law in favour of tithe.—

Whatever may have been the uncertainty as to the antecedent law, it was deemed part of the common law in 1200 that the tithes belonged as of right to the clergy of the church of the parish in which the lands lay or the persons laboured, and the Decretal Epistle of Innocent III. to the Archbishop of Canterbury merely recognised that law.³ And yet this rule was subject to the exception, probably arising from manors and parishes not coinciding, that a parson might prescribe for tithes in another parish, then called a portion of tithes.⁴ There could be no presumption for the lord of the manor or the proprietor of land and his assigns to take the tithe from the terre-tenants; for the effect of this would be to make the right of taking tithes assignable, and would make a layman capable of holding tithes in gross.⁵ Coke said, that a man might by presumption prove a valid variation as to the mode of paying tithe, but could not prescribe for an absolute discharge. And the reason given was, that “the law will not put it to the trial of laymen, who will rather strain their conscience for their private benefit than yield to the Church the duties which belong to it. And the law hath great policy therein, for the decay of the revenues of men of Holy Church in the end will be the overthrow of the service of God and His religion.”⁶

¹ See 1 Pat. Com. (Pers.) 110.

² 8 Parl. Hist. 1186.

³ 2 Inst. 641.

⁴ Gibs. 663.

⁵ Knight v Waterford,

4 Y & C. 283.

⁶ Bp. Winchester's Case, 2 Coke, 44. One maxim as to tithe was, that the glebe lands of the parson were exempt, because the church

Different classes of tithes.—These rights called tithes were at an early period divided into prædial, mixt, and personal. Prædial were said to arise directly out of the soil, as grain, fruits, and herbs. Mixt tithes arose less directly, as cattle and fowl, milk and eggs. Personal tithes again arose from personal labour, and had nothing whatever to do with land. There was also another division according to value. The great tithes were the prædial tithes of corn, hay, and wood, while the small tithes included all the other tithes. But these distinctions were subject to variation by custom, and arose out of circumstances which were extremely minute, and scarcely now intelligible.¹

Difficulties in applying the law of tithe.—The law of tithe, being like all ancient laws, very vague, it became the duty of the courts of law, and the ecclesiastical courts, to interpret and apply it to particular cases. This was done by the courts of law by way of prohibition, whenever it was clearly seen, that the spiritual courts were exceeding, or about to exceed, their jurisdiction in enforcing payment of what was illegal. The parson sometimes claimed more than what the parishioner thought right, and there were constant disputes as to the time and place and manner in which the tithe became payable, as will be seen from some leading difficulties that arose.

What are tithable things and profits of land.—One characteristic of tithable things was, that they must yield a natural increase once a year or oftener, or at least an increase like saffron, once in three years.² Hence slate and other quarries and houses were not tithable, because they yielded no natural fruit; and even to this rule there was an exception by custom, as was evident from the

shan not pay tithes to the church; but this was true only so long as the parson held possession of the glebe and the tithes.—Moyle v Ewer, 2 Bulst. 183.

¹ It was finally settled in 1742, that the question whether tithes were great or small depended rather on their nature and quality than their quantity. And hence it was solemnly decided by Lord Hardwicke, that potatoes were small tithes, whatever be the extent of ground-occupied by them.—Smith v Wyatt, 2 Atk. 364. Another decision was, that grass severed with an instrument was great tithe, but if severed by the mouth of an animal was small tithe.—Lewis v Bridgman, 2 Cl. & F. 747.

² Gibs. 669.

statute of Edward VI.¹ Fish were not in their nature tithable any more than wild creatures, which were deemed quasi in the realty unless they yielded profit.² But by custom those, who deriyed profit by fishing, paid something in the nature of personal tithe in respect of the fish caught.³ Barren heath and waste ground was also not tithable as a general rule, but a statute of Edward VI. made it so within seven years after it was turned into arable or meadow, so as to be profitable in corn and hay.⁴ Tithe of wood was a troublesome matter. The clergy demanded tithe of both underwood and young full grown wood, and at last the legislature declared, that there should be no tithe of wood after it was twenty years old.⁵ Then fine distinctions were made between certain kinds of wood, some fit for building, and some not; and, in particular, bark of oak was held not tithable, but acorns were tithable. Coke said "he could cite a world of examples of prohibitions about all these subjects in cases whereof never any learned man made any doubt."⁶ Bees did not escape tithe, their contributions being expressly mentioned in the laws of Edward the Confessor. In one case tithe was demanded, not only of honey and wax made by the bees, but of the bees themselves; and the court held that as the keeper paid honey and wax, and had to maintain the hives in winter, he ought to be let off for the bees.⁷ And for a like reason, no tithe was paid of the chickens, because the keeper paid tithe of the eggs.⁸ Apples were tithable only when plucked, but as they were often stolen, this was held a defence to the tenant, especially if the person who took them was unknown. Yet, if the tenant suffered the apples to hang too long, and so they were lost by his negligence, he must pay his tithe or the value, and he must also give tithe of the fallen apples.⁹ And there was tithe due even of the wild cherries that grew on the hedges and waste places.¹⁰ Also hothouse

¹ 2 Inst. 651; 2 & 3 Ed. VI. c. 13, § 12; *Kinaston v Piercy*, 2 Eagle & Y. 289. ² *Nicholas v Elliott*, 1 E. & Y. 698.

³ *Holland v Heale*, 1 E. & Y. 156; *Williams v Baron*, 2 E. & Y. 217. ⁴ 2 & 3 Ed. VI. c. 13, § 5; 2 Inst. 655; *Stockwell v Terry*, 1 Ves. 115. ⁵ 2 Inst. 642. ⁶ 18 Ed. III. c. 7; 45 Ed. III.

c. 3. ⁷ Cro. Ch. 403. ⁸ 1 Roll. Ab. 642. ⁹ *Hetl*, 100, 1 E. & Y. 366, 618, 655. ¹⁰ 1 E. & Y. 803.

plants, and fruits, other than exotics, were tithable; for though it was contended they were not the produce of the earth, the court thought they were as much so as cucumbers and hops.¹

Mode of recovery of tithes.—Tithes were, according to Coke, recoverable at first in the county court; and afterwards the ecclesiastical courts also enforced payment by excommunication. The mode of recovering tithes in the ecclesiastical courts before 1836 was subject to many niceties now of no importance; the main point was, whether the payment had been superseded by a modus or composition, and what was satisfactory evidence of such modus.² In 1540, and again in 1548, the legislature gave better remedies for enforcing payment of tithes, it being held before that time, that lay proprietors of tithes could not sue in the spiritual courts. The statute of Edward VI. expressly declared, that suits for subtraction of tithes should be in the King's Ecclesiastical Courts only; and the punishment was excommunication; and if the party still refused to pay after forty days, that court was to signify the same to the king in his court of Chancery, that process of imprisonment might be issued.³

Mode of setting out and delivering tithe.—One great difficulty in the practical working of the law of tithe was as to the mode of setting out and delivering the tenth part of the produce. The rule was, that the parson was bound to go and fetch away his tithe when it was set out, within a reasonable time, for otherwise he obstructed the tenant in the use of his land, and the tenant could sue him for the injury thereby caused; for it was said, "the fruit, if not removed, may rot, and cause a smell."⁴ And yet, if

¹ Adams v Waller, 3 E. & Y. 1292, 1385.

² 2 Inst. 400.

³ 32 Hen. VIII. c. 7; 2 & 3 Ed. VI. c. 13, § 13.

⁴ Wiseman v Denham, 1 E. & Y. 328. This rule was laid down in the statute of Ed. VI. thus: "Whosoever praedial tithes shall be due, and at the tithing time of the same, it shall be lawful for every party to whom any of the said tithes ought to be paid, or his deputy, or servant, to view and see the said tithes to be justly and truly set forth and severed from the nine parts, and the same quietly to take and carry away; and if any person carry away his corn or hay, or his other praedial tithes, before the tithe thereof be set forth, or, willingly withdraw his tithe of the same, and of such other things whereof praedial tithes ought to be paid, or do stop, or let

the parson did not carry off his corn tithes, the tenant was not entitled to turn in his cattle to eat them up; but he must only sue the parson for the damage caused by his delay.¹ So as to corn, the tenant was bound to make the corn when cut into sheaves ready for the parson.² And the grass must be tedded for a like purpose.³ The owner of a single calf was deemed bound to pay the tenth part of its value when taken from the cow in lieu of tithes. In one case the owner offered the parson a shoulder after killing the calf, but he was sued in the court, and the court held, after debate, as above stated.⁴ And the right to one of ten calves was held to accrue the moment this tenth calf was dropped, though it need not be taken away till it was weaned and capable of living without its dam.⁵

the parson, vicar, proprietor, owner, or other their deputies, farmers to view, take, and carry away, &c., he shall pay double tithe."—2 & 3 Ed. VI. c. 13, § 2.

¹ 1 E. & Y. 618.

² 1 Rol. Ab. 644; 1 E. & Y. 448.

³ 1 E. & Y. 625; 2 E. & Y. 479. When grass was cut, the tenant gave notice to the rector to take his tithe, but in one case the ditches round the field being impassable, it was held enough for the rector to wait till the grass was made into hay; and if the tenant would not make it into hay, the parson must do it himself, and within a reasonable time, so as not to hinder the tenant in the use of the land.—*South v Jones*, 1 *Str.* 245. And when corn was cut the rector got notice, and though the tenant was bound to leave one-tenth in cocks for the rector, the latter was bound to carry them off in reasonable time.—*Noy*, 31.

Some tithes were held to be impracticable; and grass and turnips caused great vexation. Though it was easy to separate each tenth turnip, and make a heap, yet the sheep and lambs that happened to be pasturing on the other turnips could not be persuaded to leave this heap alone, so that the tithe-owner either suffered, and probably commenced an expensive suit against the farmer, or the farmer had to be deprived of the pasturage of the turnips for the fear of such litigation. The legislature was once called on to pass a special act to set this difficulty right.—30 *Parl. Deb.* (3d ser.) 802.

⁴ A.D. 1693, 1 E. & Y. 582.

⁵ *Welch v Uphill*, 1 B. & B. 84. "A small farmer could not take his cow and calf to market for sale because the titheman told him the calf must first grow till it was independent of the mother. The titheman took the tenth day's milk, so that on that day the calves had to go without any. If one tenth row of potatoes was tithe, yet the others could not be taken up till they were measured. If a farmer had ten hens he had to keep an account of the eggs laid, the number of chickens hatched, the number carried off by the fox and other casualties. A man could not take a head of celery out of his

Difficulties as to the tithe of milk.—Nothing so well illustrated the vagueness and vexatiousness of the law of tithes as that which applied to the familiar article of milk, both in the mode of settling the amount and the mode of delivery. In one great case in 1777, the parson insisted, that the whole milk, morning and evening, of the tenth day, was his tithe, while the cowkeeper contended it was only the evening meal on the fifth day, for that was the proper tenth meal. The parson, however, said the evening meal was always less than the morning meal, and this would be defrauding him. And he satisfied the court that the evening's milk was one third less in quantity than the morning's milking. The court heard long arguments for several days, besides witnesses, and concluded that the only fair way was to give the parson the tenth morning and tenth evening meal, otherwise injustice would be done to him.¹ The parishioner appealed against this, and contended that instead of tithe this was in effect making him give the nineteenth and twentieth meals; for each milking was quite distinct. But the House of Lords affirmed the decision.² Yet this was not the only difficulty arising out of the tithe of milk.³ The quarrel also arose, whether the milkman was bound to deliver the tithe milk, and if so, whether it was to be delivered at the church porch or the vicarage house. The court, in 1678, was divided on this point, and ordered arguments both by common lawyers and civilians. After full debate and time taken to consider, the judges, by three to one, held, that the cow-feeder was bound to deliver the tenth day's milk at the church porch. The two arguments relied upon were a

garden or put a cabbage into his pot without first sending notice to the titheman, or subjecting himself to an exchequer process."—2 *Parl. Deb.* (3) 29. In 1832 tithes had become so obnoxious in Ireland, that when some cattle were seized for tithe under the protection of artillery, cavalry, and infantry, and sold by auction, no person would bid one shilling for a bullock worth ten guineas.—13 *Parl. Deb.* (3) 234.

¹ *Bosworth v Limbrick*, 7 Bro. P. C. 57. ² *Ibid.*

³ In this case the parishioner, who kept a dairy, complained, that by insisting on the whole milk of one day being given up to the parson, the calves must on that day go without their feeding, and there would be no whey for the pigs; and that a calf ten days old would drink more milk than one cow could give.

passage in Scripture,¹ and the maxim, that it was more decent for the parishioner to deliver the milk than for the vicar to send for it.² Twenty years later the court assumed, that it ought to be delivered at the parsonage house.³ Yet still later, namely in 1720, the Court of Exchequer held, that the parson was bound to send and fetch the milk in his own pails from the milking-place; and if he did not do so before next milking time it might be thrown on the ground, for the pails would then be wanted.⁴ Lastly, in 1767, the court would not allow the milk to be thrown away, if there was the least evidence of a custom to deliver at the porch door, and ordered the milkman who did so to pay the value of the milk destroyed.⁵

Difficulties as to personal tithes.—It has been seen that the laws of Edward the Confessor included personal tithe as well as the tithe of the produce of land. And by the statute of Edward VI. every person exercising merchandises, bargaining and selling clothing, handicraft, or other art (other than common day labourers) was to pay on Easter the tenth part of his clear gain. The ordinary was to summon a defaulter, and examine him by all lawful and reasonable means except his own corporal oath, concerning the true payment of this proportion of gain.⁶ This income-tax, as might be supposed, was difficult in practice to be recovered. And it is said that in the time of James I. it was treated as too indefinite to act upon.⁷ And in modern times it has long ceased to be collected.⁸

Modus substituted for tithe.—Owing to the numerous difficulties of all kinds attending the setting out, the delivery and recovery, of tithes in many parishes, special agreements had been made substituting some fixed pay-

¹ 1 Mal. iii. 10. ² 1 Eagle & Y. 516. ³ 1 L. Raym. 621.

⁴ Bunb. 73, 160. ⁵ 2 E. & Y. 222, 282. ⁶ 2 & 3 Ed. VI. c. 13. ⁷ Wood, b. ii. c. 22.

⁸ In a case in 1613 a parson sued a Bristol innkeeper, alleging that he had made great gain in selling beer, having bought a stock for 500*l.* and sold it for 1,000*l.*, and he claimed tithe of the large profit. But the court said he might as well claim tithe of all the kitchen-stuff, and granted a prohibition against the suit.—2 *Bulstr.* 141. In 1836 the Attorney General said that he had no doubt, that personal tithes could be enforced; but they ought to be abolished, and the clergy to their credit had not enforced them for many years.—35 *Parl. Deb.* (3) 95.

ments more easily ascertained than ordinary tithe in kind. And these customs in turn, owing to their vagueness, gave the courts nearly equal trouble, if not greater, in solving interminable disputes raised at every point. For though the courts allowed long usage in paying a *modus*, or some equivalent instead of ordinary tithe, to be good evidence of a legal discharge of the original common law obligation, yet sometimes the substitute claimed was very large; often they held the bargain to be so foolish and monstrous that it was void, or in other words the *modus* was said to be rank, and so not binding. Thus to give the parson a hen on St. Thomas' Day in lieu of hearthwood, honey, and apples, was deemed valid.¹ But to pay threepence for every lamb, *i.e.*, 2s. 6d. for the tenth lamb, or to pay 1s. for a sucking pig, was deemed monstrous, incredible, and not to be tolerated for its extravagance.²

Tithe commutation Acts and rentcharge.—In 1836 the vexations attending the recovering of tithe on land were got rid of to a great extent by the expedient of substituting a corn rent or rentcharge for the tithe or *modus*, however recoverable. These Acts have, since that time, been frequently amended.³ Under these Acts valuers were

¹ 2 Eagle & Y. 65.

² The judges used so late as 1817 to deliver elaborate judgments about the ancient prices of lambs and pigs. Thus GRAHAM, B., in *Layng v Yarborough*, 4 Price, 383, said, "Lord Thurlow, L. C.'s, authority on the subject of the tithe of lambs was not to be despised, and he was clearly of opinion that two shillings and sixpence for a lamb was ridiculous. He would not hear of it, and he actually refused to send it to a jury. As to a shilling for every tenth pig, I should have no difficulty in supposing that a sucking-pig was not worth a shilling, because the tithe pig is to be paid when the pig is at the dug. The farmer is not to keep it till it is a grown pig; the parson must take it in five or six weeks. Now what can be said of one pig in a farrow being worth a shilling at a time when the pig itself and all the pigs in the sty perhaps would not have been worth so much?" And RICHARDS, C. B., added, "If I find a *modus* alleged of a shilling for that which in the times to which we must refer, according to all the knowledge we have, would not be worth more than a penny, I am bound by my oath to decide, that that is a payment of modern usage and not a *modus*."

³ 6 & 7 Will. IV. c. 71; 7 Will. IV. and 1 Vic. c. 69; 1 & 2 Vic. c. 64; 2 & 3 Vic. c. 32; 3 & 4 Vic. c. 15; 5 & 6 Vic. c. 54; 9 & 10 Vic. c. 73; 23 & 24 Vic. c. 93. The tithes in the City of London stood in a peculiar position. By early Constitutions there had been

appointed to value the tithes, to apportion them on lands within a certain area with or without the consent of the owners, the basis of valuation being the average of the seven years' payments preceding 1835.¹ And in the case of lands partially exempt, either on the ground of privilege contingency or a shifting or leaping modus, the valuers could fix upon a rentcharge as a substitution for any such contingent liability.² And where Crown lands were exempt, when held by tenants of the Crown, power was given to fix a suitable rentcharge.³ And lands held by the Ecclesiastical Commissioners were also subjected to the same power.⁴ And even where lammas and common lands were liable to tithe only at certain times of the year, these could be converted into the same kind of fixed rentcharge; and even after the inclosure of such lands the power was applicable.⁵ And the like as to lands in which tithes had been commuted to a sum per head of cattle.⁶

Finality of settlement of tithe rentcharge.—The rentcharge once fixed in the way pointed out was made conclusive and final.⁷ And though there was no jurisdiction to decide which of several claimants was entitled to any particular tithe, yet the amount was thereby fixed.⁸ Whenever the apportionment of tithe rentcharge has been confirmed, the lands become absolutely discharged from the payment of all tithes at common law or otherwise.⁹ It is true, that, after being once settled by the Tithe Commis-

a commutation at the rate of three shillings and fivepence in the pound on rents, but the citizens, century after century, complained of this as illegal and void; and in the time of Henry VIII. got the rate reduced to two shillings and ninepence.—27 Hen. VIII. c. 21; 37 Hen. VIII. c. 12. Difficulties have occurred in construing the words of the statute.—*Vivian v Cochrane*, 4 De G., M. & G. 818; *London Co. v Letts*, 3 H. L. C. 470. After the great fire in London, certain annual sums were fixed upon parishes in lieu of tithes.—22 & 23 Ch. II. c. 15.

In 1866, the value of tithes turned into tithe rentcharge was 4,053,663*l.*; of which 2,412,404*l.* was payable to parochial incumbents; 766,233*l.* to lay impropiators; 678,969*l.* payable to clerical appropriators; and 196,056*l.* payable to schools, and colleges.

¹ 6 & 7 Will. IV. c. 71, §§ 33-7. ² 2 & 3 Vic. c. 62, § 11; 3 & 4 Vic. c. 15, § 14. ³ 2 & 3 Vic. c. 62, § 12. ⁴ 4 & 5 Vic. c. 39. ⁵ 2 & 3 Vic. c. 62, §§ 13, 14; 3 & 4 Vic. c. 15, § 15; 9 & 10 Vic. c. 73, § 13. ⁶ 23 & 24 Vic. c. 93. ⁷ 6 & 7 Will. c. 71, § 66; 9 & 10 Vic. c. 73. ⁸ *R. v Tithe Comrs.*, 15 Q. B. 620.

⁹ 6 & 7 Will. IV. c. 71, § 67.

sioners, the tithe rentcharge might be again altered at the owner's request by the Land-tax Commissioners with the consent of justices.¹ The tithe rentcharge was in reality fixed at an equivalent of so many bushels of corn, and the average price of corn was arrived at in a manner pointed out by the statute.² In one or two cases a fixed invariable sum could not be settled, and hence two alternative rents were taken. These were hop-grounds, orchards, and gardens, which sometimes go out of cultivation and sometimes come into cultivation. To suit the lower cultivation of the land an ordinary charge was fixed; and to suit the higher cultivation an extraordinary charge.³ Even waste land formerly exempt from tithe was made subject to this extraordinary charge when turned into hop-ground.⁴ And land not before declared subject to an extraordinary charge in respect of fruit may be defined in a district and made subject to it.⁵

Tithes were, like advowsons, treated as in all respects a distinct freehold estate, when vested in the lay impropriator. The tithe estate may be incumbered like land,⁶ and though formerly time was no bar to recovering tithes, the Act of 1833 fixed a limitation like that for land or rent.⁷ And power was conferred on the parties interested to accept or give land in lieu of tithes by way of commutation.⁸ In the case of petty sums, the Tithe Commutation Acts enabled

¹ 6 & 7 Will. IV. c. 71, § 72; 5 & 6 Vic. c. 54, § 14; 23 & 24 Vic. c. 93, §§ 11-17. The instrument of apportionment is registered for preservation.—6 & 7 Will. IV. c. 71, §§ 63, 64; 5 & 6 Vic. c. 54, § 15. The Court of Quarter Sessions may determine from time to time the fittest place of custody for these instruments of apportionment.—9 & 10 Vic. c. 73, § 17. And when they have been obtained by those not entitled, two justices may order the restoration.—23 & 24 Vic. c. 23, § 28.

² 6 & 7 Will. IV. c. 71, §§ 56, 57. ³ 6 & 7 Will. IV. c. 71, § 40; 2 & 3 Vic. c. 62, §§ 26-31; 3 & 4 Vic. c. 15, §§ 18, 19.

⁴ *Walsh v Trimmer*, L. R., 2 H. L. C. 208. But these powers do not apply to extraordinary charges put on market gardens newly cultivated, except such market gardens as had such charge imposed on them at the time of commutation.—36 & 37 Vic. c. 42. And to prevent this power operating harshly on the poor, there was an exception made where the holdings of the lands used as gardens or lawns were small.—3 & 4 Vic. c. 15, §§ 25, 26.

⁵ *Russell v Tithe Comrs.*, L. R., 6 C. P. 596. ⁶ 6 & 7 Will. IV. c. 71, § 71. ⁷ 3 & 4 Will. IV. c. 27, § 2; 37 & 38, c. 57.

⁸ 6 & 7 Will. IV. c. 71, §§ 29, 31, 62; 2 & 3 Vic. c. 62, § 19; 3 & 4 Vic. c. 15, § 17; 5 & 6 Vic. c. 54.

owners to redeem the rentcharge.¹ And when the persons entitled to the consideration money for redemption were spiritual persons, it was to be paid to the governors of Queen Anne's Bounty, and applied by them for augmentation of the benefice.² Under several local Acts corn-rents had been substituted for tithe, and these also were authorised to be converted into tithe rentcharge,³ in a manner similar to the ordinary tithe. One important power given by the Tithe Commutation Acts was to enable owners of the tithe, or of the rentcharge which took its place, by a proper deed under seal to declare it either before or after apportionment to be merged in the land, and the existing incumbrances on the tithe were thereby fixed according to certain priorities on the lands themselves.⁴ And a like power was given of merging the tithes in lands of copyhold and other tenures as well as in glebe land.⁵

Recovery of tithe rentcharge by distress.—The mode of recovering this tithe rentcharge is solely by way of distress and entry on the lands, for the tithe-payer is free from all personal liability.⁶ And any tenant of lands under a lease made subsequent to the commutation of tithe may on payment of the rentcharge set it off against the landlord's claim for rent.⁷ This one valuable improvement of the law, namely, to allow arrears of rentcharge to be recovered by distress upon the lands, may be put in force after twenty-one days' nonpayment after each half-yearly term of payment, provided not more than two years' arrears be recovered at any time in this way.⁸ These powers of distress are the same as those of any landlord for rent, reserved on a common lease for years.⁹ And if there is no sufficient distress on the premises, including growing crops, liable to pay the two years' arrears, then a judge may, on the application of the tithe-owner, order the sheriff to award possession of the lands themselves till the arrears and costs be paid.¹⁰ And the tithe-owner may wait till

¹ 9 & 10 Vic. c. 73; 23 & 24 Vic. c. 93, §§ 31, 32. ² 9 & 10 Vic. c. 73, §§ 7-10. ³ 23 & 24 Vic. c. 93. ⁴ 6 & 7 Will. IV.

c. 71, § 71; 1 & 2 Vic. c. 64; 2 & 3 Vic. c. 62, §§ 1, 2; 9 & 10 Vic. c. 73, § 18; 23 & 24 Vic. c. 93. ⁵ 1 & 2 Vic. c. 64; 2 & 3 Vic. c. 62, § 6. ⁶ 6 & 7 Will. IV. c. 71, § 67. ⁷ Ibid. § 80.

⁸ 6 & 7 Will. IV. c. 71, § 81. ⁹ *Newnham v Beever*, 8 C. B. 560.

¹⁰ 6 & 7 Will. IV. c. 71, § 82; *Exp. Arnison*, L. R., 3 Exch. 56; *Re Hammersmith*, 4 Ex. 87.

the end of two years, at which the sufficiency of the distress is to be estimated.¹ And while so in possession the tithe-owner may let the lands for a year at a fair rent by way of paying himself.² The power of distress also extends to the lands occupied by the same person, whether as tenant or owner, though the tithe rentcharge has been apportioned on one part of the land only.³ When one rentcharge is chargeable on lands of different owners or occupiers, and one owner pays the whole, he may apply to justices to enforce payment of the contribution due from the others.⁴ And the justices may adjudicate on the matter.⁵ As this distraining of goods is always a grievance, the owner of the rentcharge is allowed a small sum to cover the expense of giving previous notice in writing of the intention to distrain.⁶ Considerable allowance is also made for irregularities in making a distress, and remedies for these are not encouraged.⁷ Moreover, though the lands subject to the tithe rentcharge are liable to pay tithe when there is produce subject to tithe, yet though the owner may render his land incapable of producing tithe, he is not liable on that account in damages to the tithe-owner.⁸

Pensions, Easter dues, and fees as maintenance.—

Before the Tithe Commutation Act there were some instances of tithes having been commuted or superseded by what are called pensions or fixed sums of money paid to clergymen. These were supposed to have been decreed by some ecclesiastical judge in the course of some controversy relating to tithes, or agreed to by deed of the parties. The tithes are thenceforth enjoyed by one, and a pension instead thereof paid to another. But a statute of Elizabeth prevented any new pension being granted.⁹ The offerings or obventions called Easter dues, being small payments made by custom at communions, marriages, christenings, and like occasions, were said to be a compensation for personal tithes, and due at common law from every householder, yet varied by custom.¹⁰ In most cases they are a tax due from every person in the parish above the age of

¹ *Re Camberwell*, 4 Q. B. 151.

² 5 & 6 Vic. c. 54, § 12.

³ 6 & 7 Will. IV. c. 71, § 85.

⁴ 5 & 6 Vic. c. 54, §§ 16-19.

⁵ *R. v Williams*, 18 Q. B. 393.

⁶ 23 & 24 Vic. c. 93, §§ 29, 30.

⁷ 5 & 6 Vic. c. 54, § 19.

⁸ *R. v Nene Outfall*, 9 B. & C. 875.

⁹ 13 Eliz. c. 20, § 1.

¹⁰ *Gibs.* 739; 1 E. & Y. 818.

sixteen.¹ And they are often treated as a tax on houses, communicants, cattle, and other items, according to the user shown to exist.² The Tithe Commutation Act of 1836 did not apply to Easter offerings, mortuaries, or surplice fees, or to tithe of fish or minerals.³ But in 1839 power to commute these also was given.⁴ These small offerings and oblations had been recoverable only in the spiritual court; but in 1695, when they or the small tithes amounted to 40s. or less from one person, then they might be recovered before two justices and enforced by distress of goods.⁵ And the person summoned before justices could set up as his defence a modus, in which case justices were to forbear judgment and leave the adjudication to other courts.⁶ This jurisdiction of justices was found so convenient that the recovery of all tithes and oblations, not exceeding 10*l.*, due from one person at one time, was allowed in that way.⁷

Quakers and recovery of tithes.—In 1695 Quakers who refused to pay tithe or church-rates were made liable to distress of goods in a summary way.⁸ And this remedy against them by summary process was soon extended to include customary offerings for stipends.⁹ And in 1812

¹ 2 E. & Y. 122, 169.

² R. v Hall, L. R., 1 Q. B. 632.

³ 6 & 7 Will. IV. c. 71, § 90.

⁴ 2 & 3 Vic. c. 62, § 9.

⁵ 7 & 8 Will. III. c. 6; 53 Geo. III. c. 127, § 4; 7 Geo. IV. c. 15.

⁶ 7 & 8 Will. III. c. 6, § 8; R. v Jefferys, 1 B. & C. 604. Besides the oblations and offerings already mentioned, there were certain small fees for services rendered to individual parishioners, such as surplice fees and baptism fees. Baptism fees were in 1872 wholly abolished, except in case of some persons then having right to such fees by statute.—35 & 36 Vic. c. 36. Even in the most ancient times the notion prevailed, that the clergy should not take money for administering the sacraments, nor in the case of baptism.—*Bing. Chr. Ant.* b. v. c. 4. The amount of such fees has varied much at different times, and the validity depended on custom. A great step was taken in advance when certain commissioners were authorised to make and fix a table of such fees for each parish, each district and extra-parochial place.—59 Geo. III. c. 134. And the commutation of surplice fees was authorised in the same way as the commutation of tithes.—6 & 7 Will. IV. c. 71, § 90; 2 & 3 Vic. c. 62, § 9.

⁷ 5 & 6 Will. IV. c. 74; 4 & 5 Vic. c. 36. But not more than two years' arrears can be recovered by this remedy.—*Robinson v Purday*, 16 M. & W. 11.

⁸ 7 & 8 Will. III. c. 34, § 3.

⁹ 1 Geo. I. st. 2, c. 6, § 2.

the amount so recoverable was raised to 50*l*.¹ It was, however, specially enacted, with respect to Quakers, when tithes or other ecclesiastical demands were sued for in any court, that no process of law should issue to imprison the person but only process of execution against the goods.² And while the tithes of others to the amount of 10*l*. were recoverable before justices, the tithes of Quakers amounting to 50*l*. were so recoverable also.³ Moreover, a further peculiarity attends the recovery of tithe from them, which is this, that the goods of the Quaker, wherever situated, may be taken and sold without the necessity of first impounding them.⁴

Collecting alms in church.—While tithes and Easter offerings formed the fund for maintaining the clergy, the ancient custom of offerings may also be here noticed, though these were used for charitable objects entirely. To give oblations at the altar was one of the earliest customs of the Church, and made up what was called by Tertullian a bank of piety, to help the aged, the prisoners and captives.⁵ It was deemed a privilege, and those who gave them sometimes had their names rehearsed; but that in turn was found to lead to ostentation.⁶ And it was said the oblations of thieves and harlots were rejected. As the Church from the earliest times made it part of its business to attend to the poor, it was natural that offerings of the faithful should be received and applied to such a purpose. The canons and rubrics of the Church still recognise this practice, for they direct, that after divine service is ended the money given at the offertory shall be disposed of to such pious and charitable uses as the minister and churchwardens shall think fit, wherein if they disagree it shall be disposed of as the ordinary shall appoint. But when the same agency was extended to collections for charities of a more miscellaneous kind, the legislature, in the time of Queen Anne, thought fit to intervene, as if the collection of money in this way was a species of interference with the prerogative.⁷ And it is only in modern times that it is confessed

¹ 53 Geo. III. c. 127, § 6.

² 5 & 6 Will. IV. c. 74, § 2.

³ 5 & 6 Will. IV. c. 74.

⁴ 6 & 7 Will. IV. c. 71, § 84.

⁵ Tertull. Apol. c. 39.

⁶ Bing. Chr. Ant. b. xv. c. 2.

⁷ In 1705 a statute passed authorising briefs or letters patent to collect charity money, and the churchwardens were to keep a

to be superfluous for the law to interfere with the discretion of incumbents as to these voluntary subscriptions and donations for all honest undertakings connected with ecclesiastical affairs.

record, and the money was to be accounted for to a master in chancery, and those collecting money otherwise were liable to a penalty.—4 Anne, c. 25. This act was only repealed in 1828 when the Church Building Society was founded.—9 Geo. IV. c. 42. In one case in 1719 a clergyman was indicted for being seditiously disposed to the Government, and conspiring with divers boys and girls to wander up and down Kent to collect money, and, under the pretence of collecting charities, inciting the parishioners to give alms and gifts. And the judge told the jury, that a parish priest had no right to have collections in his church for poor children, even with the bishop's leave, as the gathering of money was an invasion of the prerogative; also of the function of the legislature; that the levying of money was the tenderest part of our constitution, for it was making the nation pay double taxes. The clergyman and churchwardens were found guilty and fined six shillings and eightpence each.—Hindley's Case, 15 *St. Tr.* 1407-18. On that occasion some London charity children were taken down to Chislehurst, and the worst that the clergyman and churchwardens there did was to make a collection to assist them.

CHAPTER VII.

THE DUTIES, DISABILITIES, EXEMPTIONS, AND PRIVILEGES
OF THE CLERGY.

Duties of clergy towards the public.—The original theory on which a parish church was founded and endowed and maintained by a tax on the whole of the parishioners, more general and searching even than a poor-rate, was, that the priest was established for the benefit of all. And as will be seen, all were for centuries bound under penalties to attend the church and receive the benefit so intended. And though in modern times it has been found impracticable to enforce this attendance, even against the churchmen themselves, because many of the parishioners have discovered that they can obtain services of a like kind more to their mind in another manner, yet some of the original theories and maxims relating to the duties of the priest survive to this day, and, being part of the statutory law, have never been repealed. One of these duties is to administer the sacrament to all parishioners who wish it, except under the conditions mentioned, and these are somewhat difficult to define. In one case in 1660, when a clergyman refused to administer the communion to a parishioner, he brought an action at law, and the court seemed to think such an action might be brought, if due notice had been given and no just excuse could be set up for refusing to gratify the applicant.¹ The 30th Article moreover may be said expressly to recognise this absolute duty not to deny the Cup of the Lord to the lay people. And the statute of Edward VI., still in force, says, that the minister shall not without a lawful cause

¹ 1 Sid. 34.

deny the same to any person that will devoutly and humbly desire it.¹ At the same time a rule enjoined by the rubric is, that the communion shall not be administered unless there are four, or three persons at the least, to communicate with the priest, or at all events reasonably expected to be ready and willing to join.² This duty of the clergy it is true was limited by the canons and rubric to such only as have been previously confirmed, or to persons in danger, or to cases of necessity. And in particular there is no obligation to admit a notorious evil liver, or one who lives openly in sin notorious, or one who has done any wrong to his neighbour by word or deed, or those between whom malice and hatred are perceived to reign, or those who are common and notorious depravers of the Book of Common Prayer, or those who have spoken against her Majesty's sovereign authority in causes ecclesiastical, or those who will not bend, or those who refuse to be present at public prayers, or those who are adulterers, incestuous, or drunken.³ But in one case of refusal, it was held to be unlawful to refuse the communion to a person as an evil liver, because he had published extracts from the liturgy.⁴ Another duty relates to the burial of the dead, the law relating to which has been already set forth in that division of the subject entitled the "Security of the Person."⁵ Another duty of the parish priest was to administer the rite of baptism. An option is given to the minister to perform it either publicly or privately: and for the public service a font of stone is required in every church.⁶ And no minister is at liberty to refuse after due notice to administer this rite to all parishioners without distinction of creed, otherwise he is liable to be suspended by the bishop.⁷ Another duty of the parish clergyman also is to marry persons. As marriage

¹ 1 Ed. VI. c. 1, § 8. ² *Parnell v Roughton*, L. R., 6 Priv. C. 46; *Clifton v Ridsdale*, 1 Prob. Div. 349. ³ Can. 1603.

⁴ *Jenkins v Cook*, 1 Prob. Div. 80. If any person administer the sacrament who is not an ordained priest, according to the form in the Book of Common Prayer, he incurs a penalty of 100*l.*—14 Ch. II. c. 4, § 10.

⁵ 2 Pat. Com. (Pers.) 434. ⁶ Can. 1603, § 81.

⁷ *Ibid.* § 68. It was recognised early in the Church as the duty of the priest to administer baptism to all who required it.—*Egbright's Exc.* A.D. 740.

in a parish church is one of the only valid ways of contracting it, if the clergyman were capriciously to refuse, parties may be prevented acquiring civil rights; yet it does not follow, that a clergyman who refuses without just excuse is liable to an action at the suit of either party.¹ And it has never been decided that either an action or an indictment will lie against a clergyman for refusing to marry two persons, though they have given due notice.² Moreover, those who feel aggrieved can always resort to a marriage in a registrar's office.

Uniformity in ceremonies of public worship.—For many ages, and so long as the leading men of the Church filled all the important offices of the State, it was natural and inevitable, that one mode of worship should become more or less settled; for as yet there were no Puritans or Nonconformists who had the courage to withstand the legislature and think for themselves both as to the authority of the laws of the Church and those of the State. All laws were once treated as of divine origin, and therefore it was deemed impious to change or even to murmur against them.³ And those laws relating to the Church, as already stated, were deemed the most divine of the divine.⁴ The canon law may be said to have been common to all European countries during the middle ages, but that share of it which had force in England was confined mainly to such doctrines as had been developed in our national and provincial synods, and not merely promulgated and adopted by the clergy, but absorbed into the common law and enforced and acted on by the courts. The canon law *per se* was of no account unless and until that absorption took place, and much of our early common law, such for example as related to tithes and advowsons, and priests, extracted from that source came to be treated as if it had been declared in solemn form by the legislature. The statute of Henry VIII. did not in strictness incorporate the existing canons and constitutions

¹ Davis *v* Black, 1 Q. B. 900.

² R. *v* James, 2 Den. C. C. 1.

³ 1 Pat. Com. (Pers.) 108.

⁴ It is said Cæcrops first regulated public worship for the Athenians, and fixed the ceremonies.—*Pausan.* b. viii. c. 2. LUTHER observed, that the ceremonies of worship were useful for the impression they left on gross and uncultivated minds.—2 *Steph. Eccl. Biog.* 467.

until they should be revised—for that was an event which never happened. That statute merely left the canon law as it was before.¹ And hence it is still law, that no canons passed by convocation can be binding if not ratified and incorporated by the legislature, which is the only recognised medium through which new laws can bind us. Up to the time of Henry VIII. and Charles II., it might have been very uncertain how many parts and maxims of the canon law had been then incorporated and enforced by the common law; but since their time the statutes must be consulted as the only source of all the new positive law which can bind both laity and clergy.

Mode of worship fixed by statute.—At the Reformation it appears that the bishop of each diocese altered the liturgy at pleasure, till Edward VI. caused the best forms to be studied, and a systematic collection called the First Prayer Book to be compiled; and then it was passed by Convocation and by Parliament. Then a second Book of Common Prayer and a second Act of Uniformity followed. Elizabeth's Parliament passed a third Act of Uniformity, and again that of James I. had also a like Act: and finally that of Charles II. passed the Act of Uniformity now in force.² In modern times no further changes have been made, for the difficulty of effecting them has been felt and acknowledged.³ Yet it has been allowed, that though the canons which have been passed could not bind the laity, they might bind the clergy, a consequence which flows from the oath of canonical obedience.⁴ Much that relates to the ceremonial and ritual observances of public worship is especially vague and indeterminate, and this arises from the circumstance that the statutes and injunctions flowing therefrom soon after the Reformation, instead of methodising and clearly expressing what was to be deemed legal or illegal thenceforth, resorted to the expedient of assuming that everybody knew what was the usual and current practice then deemed correct. This mode of defining the law by reference to the then current usage has had the consequence of increasing the difficulties of posterity, for it has obliged the

¹ 25 Hen. VIII. c. 19. ² 14 Ch. II. c. 4. ³ 151 Parl. Deb. (3), 482, 1664.

⁴ *Crofts v Middleton*, 2 Atk. 650; 2 Str. 1056; *Bp. Exeter v Marshall*, L. R., 3 H. L. 17, *ante*, p. 384.

courts, after the lapse of three centuries, to search out the law relating to ordinary matters, as antiquaries do by collecting the loose allusions of contemporary writers on miscellaneous topics, instead of seeking after expositions of principles in systematic discussions by experts, and by judges trained to speak and think correctly.

Sources of the law as to public worship.—Thus when the Reformation opened the eyes of men to the abuses which attended many current rites and ceremonies, it was all but inevitable that some minuteness should be observed as the only effectual mode of correcting what was so conspicuously liable to be misused. The First and Second Prayer Books of Edward VI., that of Elizabeth, and the Act of Uniformity, all dealt with this subject.¹ The Act of Uniformity, instead of carefully redefining and giving an inventory of the minutiae of orderly observances, resorted to the expedient of describing all things to be legal which were in use by authority of Parliament in the second year of Edward VI., and our modern disputes have all involved a research into what was known and used in that remote age. The chief sources of the law regulating the liturgy of the Church of England are thus found in the reigns of Edward VI., Elizabeth, and Charles II. In 1547, the first year of Edward VI., his council issued certain injunctions which purported to be authorised by a statute of Henry VIII.,² though some have thought these issued by virtue of the inherent right of supremacy attaching to the crown;³ and a committee of bishops and divines in 1549 prepared an order for the Communion, and finally the First Prayer Book of Edward VI. was settled and ordered by statute in 1549 to be alone used.⁴ An addition to this Prayer Book was sanctioned by statute in 1550. Objections, however, having been made to this Prayer Book as savouring too much of Romanish notions, a second Prayer Book was ordered and completed about 1551, and sanctioned by statute in 1552, to be used in lieu of the first book;⁵ and in the same year several other statutes were passed which dealt with various ecclesiastical matters. The Act of Uniformity of Elizabeth afterwards sanctioned a new

¹ 1 Eliz. c. 2, § 25. ² 31 Hen. VIII. c. 8. ³ Westerton v Liddell, Moore, Sp. R.; 1 Ed. VI. c. 12, § 2; 1 Eliz. c. 2, § 27.

⁴ 2 & 3 Ed. VI. c. 1.

⁵ 5 & 6 Ed. VI. c. 1.

edition of the Prayer Book in 1559.¹ In 1661 a Royal Commission having revised the Book of Common Prayer, another statute of Charles II. sanctioned in the following year the Prayer Book which is now in use.² By this statute all ministers were declared bound to use the copy of the Common Prayer thereby referred to, afterwards known as the Sealed Books, and of which many inaccurate copies were put in circulation.³ This form of Common Prayer continued in force till 1879, when a few alterations were introduced by a modern statute.⁴

Details of public worship, how settled.—The general guide as to the conduct of public worship is now, therefore, the Prayer Book of Charles II., which prescribes various details.⁵ Little is left to the discretion of the minister, whose individual tastes cannot be allowed to prevail; indeed, he commits an ecclesiastical offence by deviating into irregularities.⁶ The limited discretion allowed is confined to things comparatively immaterial, the chief matter left to him being whether there should be singing or choral service, or none, and as to this it appears the minister may elect, or at all events he may do so with the consent of the bishop.⁷ An incumbent who resides on his benefice

¹ 1 Eliz. c. 2, § 3. But there is some doubt whether an authentic copy of this edition can be identified.—*Clay's Lit. of Eliz. (Park. Soc.)*

² 13 & 14 Ch. II. c. 4. ³ Stephens, B. of Com. Pr. ⁴ 34 & 35 Vic. c. 37; 35 & 36 Vic. c. 35. ⁵ *Martin v Mackonochie*, L. R., 2 Priv. C. 365. ⁶ *Newbery v Goodwin*, 1 Phillim. 282.

⁷ *Hutchins v Denziloe*, 1 Hagg. Cons. 170. An ecclesiastical judge remarked on this part of the law: "The law directs, that a clergyman is not to diminish in any respect or to add to the prescribed form of worship; nothing is left to the discretion or fancy of the individual. If every minister were to alter, omit, or add, according to his own taste, this uniformity would soon be destroyed, and though the alteration might begin with little things, yet it would soon extend itself to more important changes in the established worship of the Established Church. And even in the Scriptures themselves the most important passages might be materially altered under the notion of giving a more correct version, or omitted altogether as unauthorised interpolations."—*Sir J. Nichol*, *Newbery v Goodwin*, 1 Phill. 282. "The establishment is a tax laid by the sovereign authority for payment of those who teach and preach and practice a certain system of religious doctrines. For no legislature was ever so absurd as to tax its people to support men for teaching and acting as they please, but

and has a curate, is bound once a month to read the common prayer and service under a penalty of 5*l*.¹ And if a minister of the Church of England refuse to use the common prayer at the time appointed, or use any other rite, or preach in derogation of it, he commits an indictable offence punishable with a certain imprisonment and forfeiture of the profits of the benefice.²

Prayers for the Emperor were a feature of all early Christian services.³ The Scotch ministers, both of the Established Church of Scotland, and of the body known as the Episcopal Communion in Scotland, were by the Scotch Toleration Act⁴ made liable to a penalty of 20*l*. if they did not during divine service pray in express words for Queen Anne and Princess Sophia while living, and "all the royal family."⁵ This penalty was repeated in 1792 as regards the Episcopal Communion in Scotland, and extended to "His Majesty and his heirs and successors;" but the Established Church of Scotland was thenceforth omitted.⁶

Leading ceremonies in public worship.—The variations made by the clergy in the ceremonies attending public worship have given rise in recent years to much

by some prescribed rule. The articles of religion and liturgy are not without the marks and characters of human frailty."—*Burke, Sp. Unif.* And though every one can point out obvious errors and defects in the liturgy, yet all seem to think that an attempt to re-write it would only lead to further dissensions.—158 *Parl. Deb.* (3) 880.

SWIFT, in the *Examiner*, said the name of High Church and Low Church began to be used soon after the Revolution.

¹ 14 Ch. II. c. 4, § 5; *Newbery v Goodwin*, 1 Phill. 282.

² 2 & 3 Ed. VI. c. 1, § 2; 1 Eliz. c. 2, § 2. But the offence must be prosecuted at the next assizes and not later.—*Ibid.* And this may be punished alternatively, though not cumulatively, as an ecclesiastical offence. Express power was given by statute in 1871 to vary the tables of lessons and psalter contained in the Prayer Book.—34 & 35 Vic. c. 37. Express power was reserved to "lawful authority" to change the names of the royal family in the prayers, litanies, and collects relating to them.—14 Ch. II. c. 4, § 21.

³ Tertull. *Apol.* c. 30. ⁴ 10 Anne, c. 10 (1711). ⁵ 10 Anne, c. 7, § 13.

⁶ 32 Geo. III. c. 63, § 5. The Crown exercised the power by proclamation to alter forms of prayer for special occasions without consulting Convocation. Thus when Parliament ordered the day of the Gunpowder Plot and the death of Charles I. to be observed, the forms were settled by Royal Proclamation, though Convocation had preferred other forms.—151 *Parl. Deb.* (3) 482, 1664.

litigation; and the first principles have often been discussed. The use of lighted candles on the communion-table during the celebration of the holy communion has been deemed a ceremony rather than an ornament of the holy table, and in either character is illegal, unless the candles are required to give light.¹ The legality of particular ceremonies depends mainly upon Elizabeth's Act of Uniformity.² That Act again uses as the standard of lawful ceremonies such as were recognised by the Common Prayer Book, and no distinction is made between what is important and what is trivial. The Act of Uniformity requires certainty, and no omission from, and no addition to, the rubric can be permitted.³ All ceremonies are assumed to be abolished which were not expressly retained.⁴ Though there may be articles not expressly mentioned in the rubric, the use of which would not be restrained, they must be articles which are consistent with and subsidiary to the services, as an organ for singing, a credence table from which to take the sacramental bread and wine, cushions, and hassocks.⁵ Hence, processions round the sacred edifice during the performance of the service are illegal, when so conducted as to constitute a rite or ceremony in connection with the service.⁶ So is the carrying of a cross or crucifix as part of a ceremony, or placing it on the communion-table, or bowing to it.⁷ So is kneeling, prostration, or genuflexion of the minister, instead of standing during the prayer of consecration;⁸ or making the sign of the cross at different times during the communion service.⁹ So is sprinkling of ashes and the use of holy water, or the burning of incense;¹⁰ or the elevation of the paten above the head, or otherwise,

¹ *Martin v Mackonochie*, L. R., 2 Priv. C. 387. ² 1 Eliz. c. 2, § 4.

³ The doctrine as to the sign of the cross in baptism, and kneeling at the communion, and some other ceremonies, was carried in the Convocation of Elizabeth, 1562, by a single proxy. The majority of those present were 43 (to 35) against those ceremonies, but on adding up proxies there was a majority of 59 (to 58) for the ceremonies.—

1 *Strype*, Ann. 339; 3 *Burnet*, Hist. Ref. 662.

⁴ *Martin v Mackonochie*, L. R., 2 Priv. C. 365.

⁵ Ibid.

⁶ *Elphinstone v Purchas*, L. R., 3 Eccl. 66, 95.

⁷ Ibid.

⁸ *Martin v Mackonochie*, L. R., 2 Priv. C. 381.

⁹ *Elphinstone v*

Purchas, L. R., 3 Eccl. 66. ¹⁰ Ibid. 97, 108; *Martin v Mackonochie*, L. R., 2 Eccl. 212.

during the prayer of consecration, except the mere act of removal from the table.¹ So is mixing the wine with water either before or during the communion service;² or the use of wafers instead of bread, such as is ordinarily eaten, though the bread may be made in a circular form resembling wafers.³ So is the use of small bells during the prayer of consecration;⁴ and the elevation of the offertory alms, and placing them on the credence table.⁵ The Book of Common Prayer is careful to define the very covering of the communion table. The table must have a covering, and though the colour and the material are not important, yet there must be no fringes or embroidery.⁶ The table also must be not an altar of stone and fixed, but made of wood and moveable.⁷

Position of minister during public worship.—The position in the church of the priest during the celebration of public worship has been difficult to define, owing to the Book of Common Prayer having described it merely as “the accustomed place,” and so requiring much antiquarian research by reference to several periods of time deemed material. The chancel or choir seems to fulfil the description, unless where a reading-desk or pew has been selected, that the people may best hear.⁸ The position of the minister during the communion service is more or less definitely fixed. He is to stand during the Lord’s Prayer on the north side of the table, looking south, and to remain standing during the rest of the service to the end of the creed.⁹ In breaking the bread and doing other acts mentioned in the rubric, he must so do it as to be seen by the people.¹⁰ The position of the minister during the reading of the epistle, though not expressly defined by the Prayer Book, is sufficiently defined by the ordinary legal rule, that when a duty is ordered to be performed it must

¹ *Martin v Mackonochie*, L. R., 2 Eccl. 116; *Flamank v Simpson*, *ibid.* ² *Elphinstone v Purchas*, L. R., 3 Eccl. 66, 102.

³ *Hebbert v Purchas*, L. R., 3 Priv. C. 656; *Ridsdale v Clifton*, 2 Prob. Div. 276. ⁴ *Elphinstone v Purchas*, L. R., 3 Eccl. 98.

⁵ *Flamank v Simpson*, L. R., 2 Eccl. 116. ⁶ *Westerton v Beal*, Moore, Sp. Rep. 188. ⁷ *Ibid.*; *Sheppard v Bennett*, L. R., 4 Priv. C. 371. ⁸ *Wheatley*, Com. Fr. 107. ⁹ *Martin v*

Mackonochie, L. R., 2 Priv. C. 381; *Elphinstone v Purchas*, L. R., 3 Eccl. 110; *Hebbert v Purchas*, L. R., 3 Priv. C. 657. ¹⁰ *Ibid.*; *Ridsdale v Clifton*, 2 Prob. Div. 276.

be performed in a reasonable way; and that is by the minister standing with his face to the people in a position where he may most easily be heard.¹

Vestments of clergy.—The vestments to be worn by the minister at various stages of the celebration of divine worship have been also prescribed. St. Jerome said the garb of the clergy should be neither gay nor slovenly, and their tonsure was necessary to make them appear venerable and grave.² It did not occur to the clergy to wear a peculiar dress till about the end of the fifth century, and in the sixth century councils began to notice the importance of this feature.³ The fourth council of Carthage had forbidden long hair and the beard.⁴ But the first council of Mascon went the length of enacting, that if a clerk wore garments or shoes unbecoming his profession, he should be imprisoned and fed on bread and water for thirty days.⁵ In this country it was early enjoined that the dresses of priests ought to be all of one colour.⁶ They were to have their hair clipped and to wear decent clothes and shoes,⁷ and the clothes to be of decent length.⁸ After much litigation in modern times as to the subject of vestments in the Church of England services, the points now settled as to those vestments which are lawful during the holy communion are the cope on high feast-days in cathedrals and collegiate churches; and the surplice in all other ministrations.⁹ Thus it is illegal to wear the alb and chasuble during the communion service.¹⁰

¹ See *Elphinstone v Purchas*, L. R., 3 Eccl. 66, 1111. In the early centuries the preacher sat while delivering his sermon, and the congregation stood.—1 *Chrysost. Hom.* b. i. p. 662. At the same period the custom for the people was to stand during prayer on the Lord's Day, and to kneel on the other days.—*Bing. Chr. Ant.* b. xiii. c. 8.

² Hieron. b. xiii.

³ Concil. Matic. A.D. 581; Trull. c. 27. ⁴ A.D. 398, Can. xlv.

⁵ Concil. Matic. I. c. 5. The Great Council of Geneva in 1875 forbade clergymen to appear in public in their ecclesiastical dress.—2 *Geffcken, Ch. & State*, 478.

⁶ Anselm's Can. A.D. 1102.

⁷ Richard's Can. A.D. 1175.

⁸ Otho's Leg. Const. A.D. 1237; Zoucher, Const. A.D. 1347.

⁹ *Hebbert v Purchas*, L. R., 3 Priv. C. 605, 649. The use of the chasuble, alb, and tunicle by the celebrant during communion service was discussed in this case.

¹⁰ *Ridsdale v Clifton*, 2 Prob. Div. 277. While in other services than the communion the surplice alone is to be worn, yet in cathedrals

The courts have found research needful to settle these questions. The reference in Elizabeth's Act of Uniformity has been interpreted to mean not only the First Prayer Book of Edward VI., but impliedly to render legal those vestments which the Second Prayer Book of Edward VI. had rendered illegal. But Elizabeth in the same year, and concurrently with her Act of Uniformity, issued injunctions, and under a proviso in the Act she appointed commissioners to inquire into and reform disorders, and these commissioners made inventories of church ornaments. The Queen also issued advertisements in 1564, which were prepared under her authority, for due order in divine worship, and these describe such vestments as are legal. Again in 1604 the Revised Prayer Book was issued, containing the ornaments rubric of Elizabeth's Prayer Book. And the Canons of 1603 enacted by both Houses of Convocation and ratified by James I. recognised this last Prayer Book. While the Act of Uniformity of Charles II. refers to the Prayer Book of that date, and which again refers to the ornaments used in the second year of Edward VI., that is, to the First Prayer Book, this last Act of Uniformity must also be read as consistent with the Canons of 1603.¹

Clergymen engaging in trade.—The Apostolic canons forbade the clergy to engage in worldly business, or rather in secular offices.² And soon no clerk was allowed to betake himself to secular pursuits under pain of anathema and excommunication.³ These views seemed to prevail in all countries. A statute of Henry VIII. "for the good opinion of the laity towards spiritual persons," expressly prohibited the latter from taking farms and leases of lands, and declared such leases void; and they were prohibited from buying and selling again, for lucre, at markets and fairs any manner of merchandise or cattle; but there was an exception of things bought for their private use or sold as inconvenient and without fraud or covin.⁴ An exception was made at a later date to buying and selling when spiritual persons kept schools or engaged in such small

and collegiate churches the academical hood may be added.—*Elphinstone v Purchas*, L. R., 3 *Ecc.* 94.

¹ *Hebbert v Purchas*, L. R., 3 *Priv. C.* 649. ² *Can. Apost.* c. 81.

³ *Conc. Chalced.* c. 8; *Conc. Turon.* c. 5. ⁴ 21 *Hen. VIII.* c. 13.

farming business as was incident to the glebe.¹ And the statute last mentioned prevented them ever taking shares in a bank.² In 1838 these statutes were repealed, and enactments somewhat less stringent were rewritten. This statute expressly prohibited spiritual persons who held preferment from farming more than eighty acres of land without the bishop's written consent, and a penalty is incurred for doing this without a licence.³ And for a like reason they are prohibited from engaging in trade except when there is a partnership of more than six persons, or the trading has come by legacy, succession, or marriage. There are, however, various exceptions, such as the occupation of a schoolmaster, or an author, or a director or shareholder in a benefit or insurance society, or the occupation of farming his glebe.⁴ If the spiritual person contrary to these enactments shall trade, he may be suspended for a first offence, and deprived on a third offence, but nevertheless his contracts may be enforced against him.⁵ And no contract of a company shall be void by reason of a spiritual person being one of the partners.⁶

Clergymen entering Parliament.—One of the difficulties of applying the general notions so long current about clergymen engaging in secular business was that which arose in reference to their aspiring to be members of the House of Commons. It was once doubted whether a clergyman as such was ineligible to be elected a member of Parliament, no better reason being suggested by Coke and Blackstone than that he sat in convocation and so had already got all he could wish for. And one Election Committee had in 1785 admitted a clerk in orders to be duly elected after a long debate involving much of the learning that could be brought to bear.⁷ But after Horne Tooke's election a statute was passed in 1801 to put an end to further doubt. It was then enacted and is still law, that no one ordained as a priest or deacon in the Church of England, or being a minister of the Church of Scotland, should be capable of being elected a member of the House of Commons, and any such election should be void.⁸ And

¹ 57 Geo. III. c. 99, § 4.

² Hall v. Franklin, 3 M. & W. 259.

³ 1 & 2 Vic. c. 106, § 28.

⁴ Ibid. §§ 29, 30.

⁵ Ibid. § 31.

⁶ 4 & 5 Vic. c. 14. ⁷ Newport Case, 2 Luder's Elect. Cas. 269; 40 Com. J. 561.

⁸ 41 Geo. III. c. 63.

if while being a member he should take orders, then his seat should be vacant. And if one while so disqualified shall sit or vote in the House he forfeits 500*l.* for every day he so acts. And he moreover is incapable thereafter of holding any benefice or office of profit under the Crown.¹ This enactment, however, has nothing to restrain the dissenting clergy in any respect. A kindred enactment in 1836 related to municipal offices in England. No person in holy orders, and moreover no regular minister of a dissenting congregation, can be a councillor or alderman of any municipal borough in England or Wales.² It is however now enacted, that a clergyman of the Church of England may, by a deed of relinquishment, divest himself of the clerical character, and thus he may avoid the penalties of these Acts, which disable him from entering Parliament or becoming an alderman; for he can then do as he pleases.³

Celibacy of the clergy.—One law affecting the daily life of the clergy once gave immense difficulty to synods and courts, and reflects little credit on the insight into human nature which the rulers of the Church displayed for centuries. In all ages the sacred calling of priests has suggested some antagonism between its earnest pursuit and the ordinary relations of the married state, and this was felt before the Christian era by various communities. The Jews,⁴ the Brahmins,⁵ the Buddhists,⁶ the Egyptians,⁷ the Greeks and Romans, more or less enforced the celibacy of their priests. Yet in some ancient Greek cities the office of high priest was hereditary in a particular gens.⁸ The Assyrians, Babylonians, Persians, Mexicans, Aztecs, Incas of Peru, and the Ashantees, had a hereditary priesthood maintained for the most part by the people.⁹ The doctrine of celibacy was a refinement which grew up in early mediæval times, for the earliest Christians had no such tendencies. The apostolical canons deposed a clerk who avowed such sentiments as one who had a seared

¹ Ibid. The action must be within twelve months. ² 5 & 6 Will. IV. c. 76, § 28. ³ 33 & 34 Vic. c. 91, § 4. ⁴ Math. xix.

12; Epiph. Pan. Haeres, 13, 14, 16; Philast. Haer. P. I. No. 8.

⁵ Inst. Menu, b. vi. st. 1-32.

⁶ Hardy's East. Mon. p. 8.

⁷ Diod. Sic. b. i. c. 80.

⁸ 1 Grote's Gr. 194.

⁹ 1 Geffcken, Ch. & State, 20; Bowditch's Ashant. 264.

conscience.¹ And for a like reason, if a clergyman abstained from flesh, he was held bound to eat occasionally herbs boiled with flesh, otherwise he was liable to be degraded. The object of this was, however, rather to avoid the suspicion of the Priscillian heresy.² The kindred question of digamy even in the laity was also deemed so serious, that it was a good ground for refusing communion, at least for a time, though the reason was left rather vague.³ A law of Justinian made it a qualification for the episcopate, that the candidate should have neither wife nor children to distract his thoughts, and possibly divert the wealth of the Church.⁴ It has been noticed how St. Augustine preached on the paramount claims of chastity, and the monastic spirit grew and spread amongst the laity. As patrons sprung up eager to build and found churches, it was seen to be a hateful and unseemly prospect, that the clergy once in possession should come to look on their sacred employment as a mere chattel interest descendible to their children as a portion and assignable for money.

The first canon prescribing and enforcing sacerdotal celibacy is said to have been promulgated under Pope Siricius in 385.⁵ Another canon sixteen years later ordered priests already married to be separated from their wives. And a law of Honorius in 420 also prohibited
 ✓ priests from indulging in concubinage. From the fifth to the seventh century disobedient priests on this score exercised the vigilance of successive councils. Yet in the seventh century the clergy had their wives as they have now.⁶ The Popes of the eleventh century rigorously

¹ Can. Apost. 50, 52.
 Chr. Ant. b. xv. c. 4.
 Celib. 67.

² Concil. Bracar. I. c. 32.
⁴ Const. 42, § 1; Cod. 1, 3.

³ Bing.
⁵ Lea's

⁶ Theod. Can. A.D. 673; 1 Wilk. 41. Monks and nuns were at last prohibited from marrying.—*Concil. Chalced.* c. 4, 7, 16. Perhaps Spain led the way in discovering the so-called incompatibility between the honest service of priests at the altar and their marriage in the household. At Elvira, in 305, it was declared by a council that no priest shall serve till he had first put away his wife. In Castile, the code went so far as to deprive the married priest of his benefice, and to declare that the wife shall be sold as a slave.—*Siete Part.* p. i. tit. 6. The Neapolitan Code, while ignoring the validity of a priest's marriage, yet gave a status of quasi legitimacy to his children, so as to allow them to share in the parent's property.—*Lea on Celibacy*, 346.

sentenced married priests to deposition and their wives to slavery. But at the same time the vicious compromise originated, in accordance with a canon of the Synod of Lillebone, whereby on paying a fine called *cullagium*, the clergy should be left to their own devices in this respect.¹ This state of things, subject to incessant denunciations on the one hand and apologies on the other hand, continued till the sixteenth century.² Hence also arose the irregular marriages of priests, with their attendant scandals.³

The Reformation opened the eyes of mankind to all these absurdities. Erasmus declared, that since all other measures had proved fruitless to extinguish these evils, the only mode of securing a virtuous clergy was to remove the prohibition of marriage; and in 1560 the Emperor Ferdinand had the courage to undertake to argue the matter with the Pope.⁴ But the leaders of the clergy were deaf to remonstrance; and the Council of Trent, after solemn debate in 1563, agreed, that any man who advocated such a doctrine as the marriage of priests was to be subjected to anathema.⁵

Celibacy of clergy in England.—The British and Irish Church shared in the general tendencies of the time, though some have tried to establish, that the early Saxon Church was wiser than to lean to celibacy so much.⁶ It has even been said, that in no country did the rules of celibacy meet with so little attention as in England.⁷ In 769 Archbishop Egbert of York recognised the wholesome canon against priestly marriages.⁸ Dunstan, a hundred years later, tried to deprive priests who were unchaste,—a punishment which they resisted.⁹ St. Elfric, Archbishop of Canterbury, still later, was also zealous in the same cause;¹⁰ but the supposed evil grew, and in the time of

¹ "As the clergy were prohibited by the laws of celibacy from becoming a caste, they became a corporation."—*Guiz. Civ. Eur.*

² Lea, *Celib.* 271.

³ The most noted of these irregular marriages was that of Abelard and Héloïse.

⁴ SIR WILLIAM SCOTT said that "it was one of the best effects of the Reformation, that, by introducing the clergy to the charities of domestic life, they had obtained a practical knowledge of its duties."—*36 Parl. Hist.* 474.

⁵ Concil. Trid., Sess. 24, Matr.

⁶ 2 Thorpe, *Anc. L.* 472.

⁷ 2 Hallam, *Mid. Ag.* c. 7.

⁸ Lea's *Celib.* 167.

⁹ 1 Spelman, 479.

¹⁰ A.D. 1006; 2 Thorpe, *Anc. L.* 345.

Edward the Confessor great laxity in practice was observed.¹ To go no further back than the Council of Winchester in 1076, it was then declared generally, that priests had no business with wives, and none were to be admitted to orders unless they took a pledge not to marry.² And in 1107 the Council of London enjoined, that a married priest who performed mass was to be deprived, and his children forbidden to inherit the father's benefice.³ At length, in 1129, the king summoned a great assembly of bishops and priests to consider the immorality of the times; and it was ordered that, if priests then serving in cures did not put away their wives, they must be ejected. Yet all this ended in the fine already mentioned, called *cullagium*, being accepted, for dispensing with these virtuous, self-denying ordinances.⁴ In another century and a half, priests had ceased to marry, but clandestine concubinage became too prevalent.⁵ In 1485 a statute of Henry VII. specially ordered religious men convicted of incontinence to be imprisoned.⁶ Wolsey tried in vain to enforce the punishment of priests for concubinage, which induced him to obtain a bull for the confiscation of monasteries, and endowing with these spoils his colleges of Christchurch and Ipswich.⁷ A general visitation of monasteries soon followed under the authority of Henry VIII., and Parliament passed Acts suppressing some hundreds of houses said to be possessed of great revenues.⁸ But though monachism was rudely torn up by the roots, the celibacy of the clergy was left alone, as being still unquestionable. In 1539 a statute of Henry VIII. made it a penal offence for priests to marry, or even to teach the doctrine, that it was lawful for them to marry. To preach against this statute was to incur a sentence of death without benefit of clergy, and even to hold opinions contrary was forfeiture of land and goods. And priests who per-

¹ Lives, Ed. Conf. 432. ² 1 Wilkins, 367. ³ Ibid. 382.

⁴ Angl.-Sax. Chr. temp. 1129. ⁵ 3 Wilkins, 240. In Ireland the same evils were conspicuous.—2 Wilkins, 502. ⁶ 1 Hen. VII. c. 4. ⁷ 3 Wilkins, 669, 678, 704.

⁸ The total number of monasteries suppressed by Henry VIII. was 645; colleges 90; charities and free chapels 2,374; hospitals 110. The rest were swept away by Edward VI.—37 Hen. VIII. c. 4; 1 Ed. VI. c. 14; Lea's Celib. 470.

sisted in having wives were liable to be executed as felons.¹ The accession of Edward VI. led to an Act abrogating all these extravagant canons and laws.² But Mary's Parliament in turn restored them, and deprived thousands of unfortunate priests who had meanwhile acted on the temporary leave allowed.³ Elizabeth refused to go the length of Edward VI., and, while declining to declare such marriages legal, declined also to enforce the prohibition which was kept standing.⁴ Her Injunctions to the clergy in 1559, while admitting that priests might marry, yet seemed to regard the sanction of the bishop and two justices as necessary to give becoming decorum to so perilous a step.⁵ Her prejudice, it is said, against married priests long survived, though in the 39 Articles it was found expedient to declare, that priests had liberty of marriage like their neighbours. And no traces of any restriction have ever since been revived.

Some recreations of the clergy restrained.—An early council of the Church laid it down that it was foreign to the business of bishops and presbyters to keep dogs and hawks for hunting; and a violation of this rule was ground of suspension for three months.⁶ Yet this prohibition against hunting seemed not observed by the bishops. Lord Coke points out, that the canon law prohibited spiritual persons to hunt, yet that the common law allowed them "to use the recreation of hunting to make them fitter for the performance of their duty and office."⁷ And he said, in the time of Edward I. at the bishop's death his kennel of hounds had to be given up to the king, in order that the king might give his licence to the bishop's will taking effect.⁸ It was no doubt found to be impossible to enforce each or any of these matters literally, and no statute now interferes with the judgment of individuals. The canons of 1603 do not allude to hunting, but repeat the caution which had long been given by councils of the Church, and

¹ 31 Hen. VIII. c. 14; 1 Parl. Hist. 540. ² 1 Ed. VI. c. 12, § 2; 2 & 3 Ed. VI. c. 21. ³ 1 Mary, st. 2, c. 2. 12,000 priests were deprived at this time.—*Lea, Celib.* 495.

⁴ 2 Burnet App. 332. The archbishop of the day complained to Queen Elizabeth, that the House of Commons gave liberty to marry contrary to the canons.—*Strype's Whitgift*, 206.

⁵ 4 Wilk. 186; 1 Neal's Pur. 128. ⁶ Concil. Agath. c. 55.

⁷ 4 Inst. 309. ⁸ *Ibid.* 338.

was enforced by the Justinian code, against playing at dice, cards or tables.¹

Privileges and exemptions of clergy from taxes and duties.—In Rome very early a law was made exempting priests from military duty.² Coke says, the chapter of Magna Charta, that the Church of England shall be free, and shall have her whole rights and liberties inviolable, meant, that ecclesiastical persons and their possessions should be freed from all unjust exactions and oppressions. And he added, that “ecclesiastical persons had more and greater liberties than other of the king’s subjects, wherein to set down all would take up a whole volume of itself.”³ He afterwards mentions, that by the custom of England the clergy ought not in person to serve in war, and ought to be quit of tolls and customs, avirage, pontage, paviage, and the like: and that in times past they, seeking to extend their liberties beyond their true bounds, either lost or enjoyed not that which of right belonged to them.⁴ And when it was a serious thing to be knighted, they were exempted by a statute of Edward I. from that doubtful honour.⁵ The success with which the clergy escaped capital punishment by the expedient of benefit of clergy has been already described.⁶ The peculiar duties of the clergy and their urgent nature led to an early maxim of the common law in aid of the canon law, that they should be exempt from compulsory temporal offices incompatible with making their spiritual duties paramount; and a writ of privilege for the clergyman’s discharge was granted in

¹ Can. 1603, § 75. Some ancient canons also forbade bishops to read heathen authors.—*Conc. Carth.* IV. c. 16.

² Plut. Camill. ³ 2 Inst. 3. ⁴ Ibid. 4. ⁵ 1 Ed. II. de milit. ; 1 Pat. Com. (Pers.) 428.

⁶ 2 Pat. Com. (Pers.) 299. Bishops were in the time of Justinian exempted from taking oaths as witnesses.—*Nov.* 123, c. 7. And priests were exempted from torture when witnesses—a substantial boon.—*Code*, 9, 41, *De quest.* They were also exempted from some of the taxes, when these were in the shape of head-money. They were prohibited from meddling with law, it being matter of reproach that they should show themselves skilled in the decision of law-suits.—*Just. Code*, 1, 3, 41. The church lands had immunity from taxes in the early centuries, and lay proprietors often turned this rule to their own advantage by granting estates to the church, which they received again by way of fief or lease exempted from public burdens.—*Hallam Mid. Ag.* c. 7.

many cases.¹ In course of time the clergy were less and less exempted from ordinary taxation, and Hale, C. J., said, that upon debate before all the judges the clergy were held liable to all public charges imposed by Act of Parliament.² The clergy, under the description of parsons and vicars, were expressly made liable in respect of their tithe and parsonage and vicarage and glebe to the poor-rate.³ It is true when the parson lets the tithes to a tithe farmer, the latter, as being the occupier, then becomes exclusively rateable to that extent.⁴ And by express statute of recent date, all churches and chapels are exempt, being used exclusively for public religious worship.⁵ Rectors, however, are also liable for rates founded on the poor-rate, for they are included in the word inhabitant,⁶ and in the word parishioner.⁷ But the clergy are expressly exempt from acting as overseers of the poor⁸ and as jurors.⁹

The clergy are also expressly exempted from paying turnpike tolls in certain circumstances, that is to say, in going to or returning from visiting any sick parishioner, or on other parochial duty within their parish.¹⁰ It has been decided under this enactment, that the clergyman who, as curate, does the duty of the incumbent, is also exempt;¹¹ and that the exemption applies though the clergyman's family are with him in the carriage.¹² But a clergyman not licensed by the bishop as a curate, though doing the duty, has no exemption.¹³

One peculiarity in the law of evidence was long connected with a duty or function of the clergy, namely, the duty to receive confession. As there is nothing expressly enjoined in the canons, articles, or statutes relating to the Church of England which makes confession, either special or general, a duty or practice, either on the part of a lay member to make, or compulsory on the priest to receive, it follows that when such a confession is made to a

¹ 1 Inst. 96; 2 Inst. 3. But it seems that if the sovereign appointed a clerk to a temporal office, this made the latter his paramount duty.—*Artic. Cleri*, 9; 2 Ed. II. st. 1, c. 8; 2 Inst. 624.

² *Webb v Bachelor*, Vent. 273; 3 Keb. 255, 476. ³ 43 Eliz. c. 2, § 1. ⁴ *R. v Lambeth*, 1 Str. 525. ⁵ 3 & 4 Will. IV. c. 30, § 1. ⁶ 2 Inst. 704. ⁷ 1 Hawk. P. C. 204. ⁸ 1 Bott, 9.

⁹ 33 & 34 Vic. c. 77. ¹⁰ 9 Geo. IV. c. 126, § 32. ¹¹ *Temple v Dickenson*, 1 E. & E. 34. ¹² *Layard v Ovey*, L. R., 3 Q. B. 415. ¹³ *Brunskill v Watson*, L. R., 3 Q. B. 418.

priest, it being in no sense a public duty, the priest is not exempted or privileged from giving such confession in evidence, should the interests of justice require it.¹ And the same rule is acted on in reference to confessions made to Roman Catholic priests. Whatever may have been deemed the law before the Reformation can be of no authority now, seeing that the powers and duties of priests were greatly curtailed, and in some instances abolished from that time, expressly or impliedly.

Offence of disturbing divine service.—Nor was it to be wondered, that the canons should specially mark out for censure those who behaved rudely and were disorderly in church, and by noise hindered the minister or preacher.² The jurisdiction of the Ecclesiastical Courts in the matter of defamation and brawling had become so oppressive and vexatious, that it was wholly abolished in very recent times; and so much of the law as protected the clergy, whether of the Church of England or as Nonconformists, from interruption in their sacred functions was treated as a general common law offence, and punished with fine and imprisonment in a summary manner by justices of the peace.³ A statute of Richard II. prohibited priests being arrested during divine service.⁴ In 1812 it was made a penal offence for any congregation of persons for religious worship (whether dissenters or not) to have the door of the church or chapel locked during divine service.⁵ And at the same time it was made still more penal to disturb the congregation or the person officiating.⁶ To arrest, or molest, or distract a clergyman or other minister during divine service is now a misdemeanour.⁷ And to make a riotous, violent, or indecent disturbance in any place of religious worship is punishable by fine or by a short imprisonment.⁸

Resignation of office of priest.—Another singular doctrine embodied in the canons was, that whoever once became a deacon or minister of the Church of England could not thereafter divest himself of that character, so

¹ *R. v Gilham*, 1 Mood. 186, 452. See also 6 Cox, C. C. 219; 2 F. & F. 4. ² Can. 1603, No. 111. ³ 18 & 19 Vic. c. 41; 23 & 24 Vic. c. 32. ⁴ 1 Rich. II. c. 15. ⁵ 52 Geo. III. c. 155, § 11. ⁶ *Ibid.* § 12. ⁷ 24 & 25 Vic. c. 100, § 36. ⁸ 23 & 24 Vic. c. 32, § 2.

that the maxim prevailed—once a priest always a priest.¹ Lord Eldon said that the canon law as to the indelibility of holy orders had been part of the common law, and was so treated by Hale, Holt, and Hardwicke.² Hence when a priest became a dissenter and preached in a dissenting chapel, it was found that he could be punished for the breach of discipline.³ It was not till the year 1870 that an Act of Parliament passed to relax this rule and permit these persons, like the rest of their fellow-citizens, to follow any occupation they pleased, and to change it as often as they thought fit.⁴ In order, however, to divest himself, he must execute a formal deed of relinquishment, and give notice to the bishop and archbishop six months before he can be free.⁵ If the clergyman do not wish wholly to relinquish the clerical character and become a layman, he may merely resign his incumbency on terms. When an incumbent is incapacitated by permanent mental or bodily illness, a mode now provided by the statute for his resigning is pointed out, and a pension, not exceeding one-third of the value, is allowed to him, which is made a charge on the benefice. The merits of the case are investigated by five commissioners appointed by the bishop after notice to all interested parties.⁶ It is true that after resignation the clerk may, nevertheless, be prosecuted for any offence which would have involved suspension or forfeiture.⁷ The patron may, after such resignation, present a successor as if the resigning incumbent had died.⁸ And the benefice is never to be charged with more than one pension at a time, and the pension is not assignable.⁹

¹ Can. 1603, § 76. LUTHER said, that the doctrine of indelibility of holy orders was altogether indefensible. He said the priest was an office-holder and nothing more.—1 *Geffcken's Ch. & State*, 296. The Bishop of Rochester in 1756 wished to resign, but was told he could not do so, as the peerage was inalienable.—3 *Walpole Lett.* 307.

² 35 Parl. Hist. 1545.

³ *Barnes v Shore*, 8 Q. B. 640.

⁴ 33 & 34 Vic. c. 91.

⁵ *Ibid.*

⁶ 34 & 35 Vic. c. 44.

⁷ *Ibid.*

⁸ *Ibid.* § 12.

⁹ *Ibid.* §§ 9, 10.

CHAPTER VIII.

OFFENCES AND PUNISHMENTS OF THE CLERGY.

Jurisdiction of Ecclesiastical Courts generally.—The remedies against clergymen are divided into those of a civil and of a criminal nature; but there has been a difficulty in a few instances in determining to which class a particular proceeding belongs. Thus it has been decided that civil suits include a proceeding to recover penalties for non-residence:¹ for preaching without a licence;² for compelling removal of unlawful ornaments:³ to pay over to the churchwardens the offertory moneys.⁴ One characteristic of a civil suit is, that none but a parishioner is allowed to be the plaintiff, for some interest in the subject-matter is essential.⁵

When the Ecclesiastical Courts first took shape, all courts, ancient and mediæval, had been acting on the notion, that law and courts must exist for the purpose of enforcing all the virtues; and it was easy to excuse the ecclesiastics from gliding by an easy transition into the kindred notion, that Ecclesiastical Law and Ecclesiastical Courts must exist for the sole purpose of enforcing the Christian virtues, of which they were the chief expounders. Hence they set vigorously to work at this as a labour of love, and it was natural that in course of time they would begin to see, that everything of human concernment resolved itself more or less into an affair of Christian conduct. Hence the Church interfered, and exercised its jurisdiction in a great variety of matters of worldly business for the health

¹ Bluck v Rackham, 5 Moore, P. C. 305. ² D. Portland v Bingham, 1 Hagg. Cons. 157. ³ Lee v Fagg, L. R. 6 Priv. C. 38.

⁴ Liddell v Rainsford, 38 L. J. Eccl. 15. ⁵ Turner v Meyers, 1 Hagg. Cons. 415.

of the soul, as it was then called.¹ It was natural that early in the Christian era a notion should spring up, which is to this day not wholly extinct, that all differences between man and man should be referred to the arbitration of a Christian man, particularly one of the clergy: and they were soon resorted to as referees. A law of Arcadius and Honorius declared it to be a good thing to refer civil suits to the arbitration of bishops; and ten years later the civil courts were directed to execute these friendly sentences.²

In England, in the time of Athelstan, the bishops were ordered by the Synod of Greatley to sit with the judges in secular courts to prevent the germs of iniquities from

¹ "The jurisdiction, *pro salute animæ*, had been the cause of very great expense and very little benefit."—*L. Cottenham, L. C.*, 31 *Parl. Deb.* (3) 326. LORD HARDWICKE, *L. C.*, said: "The common argument that the spiritual courts proceed only *pro salute animæ* of the offender, but the temporal courts punish him either in body or purse, is a distinction without a real difference, for all punishment is intended for the reformation of the offender and an example to others. And this is the end both of the ecclesiastical censure and the temporal penalty, when they are both inflicted immediately and directly for the same thing."—*Middleton v Croft*, 2 *Atk.* 673.

² *Const.* 7, 8; *Cod. I.* 4. St. Augustin, who used to preach that all litigation was a sin except conducted before ecclesiastics, had crowds of suitors at his door.—*Aug. Serm.* 351. St. Patrick indeed expelled from the church all who would or could not see this cardinal principle of conduct.—*St. Patr. Synod. I.*, A.D. 456, Can. 21. The clergy by degrees found, that this practice somehow led to gifts and unexpected benefits coming into their possession, and rather interfered with their proper business.—*Socr. Hist. Eccl.* b. vii. c. 36. The Emperors thought it better to restrict the subject-matter of ecclesiastical jurisdiction to religious things; and they were not to be drawn into the civil courts if possible.—*Cod. Theod.* b. xvi. tit. 11, 12. It was indeed conceded that in civil controversies with laymen the latter were entitled to resort to the civil courts.—*Valent. Nov.* xii. As regards the lesser crimes, they were taught that their own courts had ample power.—*Bing. Chr. Ant.* b. v. c. 2. Yet the bishops kept up a practice of redressing wrongs on appeal from the civil tribunals.—*Nov.* 86, c. 1, 2, 4. Under the supposed inspiration of the false decretals, the clergy revived their claims, and encouraged wealthy suitors always to look to Rome as an ultimate appeal and the original fountain head of all human justice. And even kings were thought liable to be deposed by the ecclesiastical supreme law.—*Capit. Car. Mag.* tit. 30, c. 5; *Specul. Succ. Introit.* §§ 22-34. In the earlier centuries the notions of jurisdiction were vague, and both sides were irresolute. In France in the sixth century, Clotaire authorised bishops to reprove civil judges for unjust sentences.—*Const. Clot.* A.D. 560, § 6. A little later this was thought to be going beyond the line of

budding.¹ And Coke says, "the ancient law of England was, that the bishop with the sheriff did go in circuit twice every year, by every hundred within the county, which also appeareth by *Magna Charta*."² But William the Conqueror's charter forbade any spiritual cause to be tried in the secular court, and commanded the suitors to appear before the bishop only, who was directed to conform to the canon law. And though Henry I. restored the older law, the ecclesiastics in Stephen's reign again procured the bishops' jurisdiction to be kept distinct.³ Henry II. saw the growing mischief of the Ecclesiastical Courts arrogating universal jurisdiction, and tried in the Constitutions of Clarendon to check it by giving to his common law judges the cognisance of contracts, advowsons, and offences committed by clerks. The Pope, it is true, professed to annul most of the Constitutions of Clarendon, but the clergy began to be displaced in the courts by common law lawyers, and writs of prohibition to the spiritual courts soon became common.⁴

The lowest court of ecclesiastical jurisdiction was the archdeacon's, and from thence an appeal lay to the consistory court of each diocesan bishop, and from thence to the archbishop, or Court of Arches. The Statutes of Henry VIII. up to very recent times regulated the course of these appeals. In 1534 the statute of that king recited, that the jurisdiction of the Crown, spiritual and temporal, had always sufficed as settled by previous Acts and ordinances, without the intermeddling of any exterior person, and that all the king's subjects shall use their appeals, first from the archdeacon or his official, if the matter be there begun, to the bishop diocesan of the said see. And if the cause be commenced before the bishop diocesan, or his commissary, then from them to the archbishop and there to be definitively settled and ordered. Suits commenced before the archbishop were to be without any other appeal. And in all matters touching the king, his heirs, or successors, then the appeal shall be from any of the above courts to the Upper House of Convocation

duty.—*Greg. Turon. Hist.* b. viii. c. 39. The Welsh code positively forbade ecclesiastics from acting as judges.—*Dimet. Code* b. ii. c. 8, §§ 128, 132.

¹ A.D. 928, 1 Pusey Suprem. 107. ² 2 Inst. 70. ³ 3 Bl. Com. 64.

⁴ 1 Hallam, Mid. Ag. 224.

assembled by the king's writ.¹ And the statute of the next year confirming the above enactment, further provided, that any person might appeal from the Archbishop's Court to the king in his Court of Chancery, and upon such appeal the king should issue a commission to persons named who should definitively determine such appeals, and no further appeal was to be had.² These commissioners afterwards appointed by the Crown from time to time were called the Court of Delegates, a court little resorted to when the High Commission and Star Chamber were at work; and it has been said that if the delegates for some reason made a mistake, the Crown might have again issued a commission of review.³ But no better reason seemed to be given for this than that the Pope used to do something similar in the management of his own affairs. That power is, however, now of no importance, for in 1832 the whole jurisdiction formerly exercised by way of appeal from all ecclesiastical courts was transferred to the Judicial Committee of the Privy Council, consisting of certain high judges and others (including archbishops and bishops) appointed from time to time by the Crown.⁴

Ecclesiastical courts watched by temporal courts.—

According to Coke, Boniface's Canons, and Constitutions, made before 1258, had encroached greatly on the jurisdiction of the civil courts, and thus prohibitions required to be issued, and controversies arose between the judges of the realm and the bishops; and the judges kept with great difficulty the Ecclesiastical Courts from encroaching. And then the clergy exhibited articles to Henry III., complaining of these prohibitions.⁵ As Coke said, the judge at that time openly said, that "The temporal courts must always have an eye, that the ecclesiastical jurisdiction usurp not upon the temporal."⁶ The clergy

¹ 24 Hen. VIII. c. 12. ² 25 Hen. VIII. c. 19. ³ 4 Ves. 186.

⁴ 2 & 3 Will. IV. c. 92; 3 & 4 Vic. 86, § 4. ⁵ Artic. Cl.; 9 Ed. II.; 2 Inst. 599.

⁶ 2 Inst. 615. So late as 1839 a bishop told the House of Lords, that bishops had been invested with the authority of judges by a higher tribunal than any House of Parliament—they had received their authority from the great Head of the Church—it was coeval with the establishment of Christianity on the earth.—*Bp. Exeter*, 49 *Parl. Deb.* (3) 770.

have always felt this grievance of prohibitions, which in other words meant, that the civil court was to decide whether the Ecclesiastical courts had exceeded their jurisdiction. In 1603 they preferred articles to the Privy Council against the judges, when the whole of the judges were questioned as to the nature and extent of this jurisdiction; and it was then fully discussed.¹ The clergy alleged, that in the reign of Elizabeth and the first three years of James I. there had been 570 prohibitions; and they were sure that nine in ten, nay, nineteen in twenty, if not thirty-nine in forty of these were wrong. But the judges replied, that this was mere vague generality and clamour on the part of the ecclesiastics, and they must specify particular instances. The clergy then particularly complained, that in one suit for tithes against a parishioner the temporal court had granted a prohibition on the mere suggestion, that the parishioner had given the minister a cup of buttered beer to cure him of a grievous cold, whereby all his tithes were discharged.² To which the judges retorted, that the minister should not have made so ridiculous a contract. And in another case complained of, the judges replied, that if the spiritual court punished a woman for adultery, whereas all they could prove against her was night walking, they could not avoid granting prohibition in such circumstances. And like views have always prevailed more or less in the temporal courts as to the jurisdiction of the spiritual courts.

Excesses of the ecclesiastical jurisdiction.—One court distinguished itself in its time as ambitious to reform all errors whatever in the Church. The High Commission Court originated with Queen Mary, who was zealous to inquire after heretics, and Queen Elizabeth's Parliament enlarged the scheme and superadded to heresy the duty of inquiry into seditious and false news.³ In the time of Charles I. the court professed to have power to examine its prisoners on oath.⁴ Coke thought it never had the right either to fine or imprison,⁵ though in its time it did both, and it was utterly abolished in 1640.⁶ The modern jurisdiction of the ecclesiastical

¹ 2 Inst. 601. ² 2 Inst. 601; Artic. cleri, 2 St. Tr. 142.

³ 1 Eliz. c. 1; 1 Hallam Const. H. c. 4. ⁴ 2 Hallam Const. H. c. 8. ⁵ 4 Inst. 324. ⁶ 16 Ch. I. c. 11.

courts over the laity may now be said to be wholly abolished, except so far as regards churchwardens and officers of the church, and the interference of parties with the fabric of the church or the churchyard. Even the canons profess to deal with no subject of the realm who is not a member of the Church.¹ Many things however were treated by the canons as offences which are no longer so.² Even the civil courts, including courts-leet, according to Coke, had once power to punish adultery and fornication by way of fine.³ But so early as the time of Edward I. the civil courts were ordered not to interfere with the Bishop of Norwich and his clergy (which Coke thought applied equally to all other bishops and clergy), for dealing with these offences.⁴ And acting on this notion, the ecclesiastical Courts were apparently allowed to treat solicitation of a woman's chastity as an offence.⁵ And cases of incest were also deemed within their jurisdiction, where no property was concerned in the question.⁶ So late as 1757 a methodist preacher was condemned by those courts to public penance for incontinence.⁷ And though a statute was passed thirty years afterwards to prohibit ecclesiastical courts from punishing for incontinence after the lapse of eight months,⁸ yet the House of Lords has held that that statute did not apply to the clergy but only to the laity, and hence incontinence is still a well-known cause of suit under the Church Discipline Act.⁹ Nor can the ecclesiastical courts now punish any lay person for

¹ Can. Preamble; *Croft v Middleton*, 2 Atk. 650; 2 Str. 1056.

² It was long doubted, whether in case of perjury being committed in an ecclesiastical suit, the remedy is still, as it once was, in the ecclesiastical court, inasmuch as the statute of *circumspecte agatis* expressly gave the ecclesiastical courts power to punish for breaking an oath when money is not demanded, so far as can be done for the punishment of sin.—13 Ed. I. st. 4; 5 Eliz. c. 9, § 5; 5 Eliz. c. 23; *Bp. St. David's Case*, L. Raym. 451; *R. v. Lewis*, Str. 70. But the modern statutes punishing for perjury clearly apply to all courts, whether ecclesiastical or temporal; and therefore the ancient jurisdiction of the ecclesiastical courts even over the clergy for perjury must be taken to be impliedly repealed.—*R. v. Green*, 5 Mod. 348; 16 Vin. Str. 313; 2 Rol. Ab. 257.

³ 2 Inst. 487. ⁴ 13 Ed. I. St. 4; 2 Inst. 488. ⁵ *Gallisand v Regaud*, L. Raym, 809. ⁶ *Harris v Hicks*, 2 Salk. 548.

⁷ *Wheatley v Fowler*, 2 Lee, 376. ⁸ 27 Geo. III. c. 44. ⁹ *Free v Burgoyne*, 2 Bligh, N. S. 65.

brawling and disorderly conduct in church, there being a sufficient remedy by application to justices of the peace.¹ Nevertheless the clergy may still be punishable for that offence as an ecclesiastical offence.² And the jurisdiction for defamation was also wholly taken away from the ecclesiastical courts, as the civil courts deal now exclusively with slander when it is actionable.³ And finally the Church Discipline Act in 1840 provided a new mode of procedure, and enacted, that no criminal proceeding against the clergy for any offence against the laws ecclesiastical should be instituted in any ecclesiastical court otherwise than as therein provided.⁴

Remedy under Church Discipline Act against clergy.

—The incidents of the procedure in the ecclesiastical courts belong to that division of the law entitled Judicature. It is enough to say that all criminal suits against clergymen are now instituted and carried on under the procedure set forth in the Church Discipline Act.⁵ One feature of this Act is, that all criminal proceedings must be begun either by a preliminary inquiry under commissioners appointed by the bishop, so as to see whether there is a *prima facie* case fit to be tried out in the regular way, or the bishop may at once refer the trial to the Court of Appeal for the Province—that is to say, to the Court of Arches. And all such suits must be commenced within two years from the time when the offence was committed.⁶ This Act is thus at once a law of criminal procedure as to the offences to which it relates, and a statute of limitations as to penal prosecutions.⁷ And the bishop has an absolute veto on the commencement of any proceeding under this Act.⁸ And though he may send the case to be tried by the Arches Court, still the latter court is not bound to assume jurisdiction.⁹

¹ 23 & 24 Vic. c. 32. ² Ibid. § 1. ³ 18 & 19 Vic. c. 41, *ante*, p. 208.

⁴ 3 & 4 Vic. c. 86, § 23. In 1839 there were 360 ecclesiastical courts exercising criminal jurisdiction, and each having its own notions of law. The House of Commons resolved, that they ought to be put an end to without delay; and hence the Act of 3 & 4 Vic. c. 86.

⁵ 3 & 4 Vic. c. 86. ⁶ 3 & 4 Vic. c. 86, § 20. ⁷ *Ditcher v Denison*, 11 Moore, P. C. 324. ⁸ *Julius v Bp. Oxford*, H. L., 23 March, 1880.

⁹ *Sheppard v. Bennett*, L. R., 2 Eccl. 335. At one time it was settled that for the conviction of a bishop seventy-two witnesses

When a clergyman has committed an offence for which he may be tried in a temporal court, the ecclesiastical court may nevertheless take cognizance of the offence for its own purposes of discipline. It cannot indeed profess to punish him for the crime committed, but it may suspend or deprive him on the ground of the acts committed, whether these are proved by conviction in the temporal court, or though the clergyman has not been yet punished by such court.¹ And though for incontinence no suit can be brought in the ecclesiastical courts for mere discipline after eight months,² yet that court may nevertheless inquire into the same facts after that date for the purpose of deprivation.³

In some of the offences of clergymen, such as using forbidden ceremonies and ornaments—offending against the Prayer Book as regards services, rites, and ceremonies, a shorter and more prompt remedy is given by the Public Worship Act of 1874, which treats such offences as of a civil nature.⁴ And the proceeding must be instituted by the bishop either at the instance of the archdeacon or a churchwarden, or any three male parishioners, members of the church and resident at least a year; or in case of cathedral or collegiate churches, any three inhabitants of the diocese.⁵ The bishop may however refuse to prosecute under this Act, provided he state the reasons for his opinion to be furnished to the relator.

Clerical offence of schism and heresy.—The offence of schism, and of affirming and maintaining, that other assemblies than the Church of England are true and lawful churches, is set forth in the canons, but recusants and nonconformists are no longer subject to be excommunicated on that account. And schism is now scarcely recognisable as an offence even of the clergy. The form it may assume is better known as heresy.⁶

were required, and these must be heads of families and professing Christians; while forty-four would suffice for a priest, thirty-seven for a deacon, and seven for a sub-deacon.—*Capit. Car. Mag.* vi. A.D. 806, § 2. And a variation of this law had been accepted in England a century earlier.—*Thorpe, Anc. Laws*, ii. 73.

¹ *Free v Burgoyne*, 2 Bligh, N. S. 65; 1 Dow & Cl. 115. ² 27 Geo. III. c. 44, § 2. ³ *Burder v Hodgson*, 3 Curt. 822. ⁴ 37 & 38 Vic. c. 85. ⁵ *Ibid.* § 8.

⁶ In 1542 a statute of Henry VIII. expressly forbade as pestiferous

It has sometimes been said that all the ancient nations except the Persians and Jews were to a certain degree tolerant.¹ But it would be difficult to distinguish between ancient and modern nations in this respect, or to show that the law in any one epoch was less vindictive than in another against offenders of this class.²

Heresy.—According to Hale the common law recognised the ecclesiastical judge as the judge of heresy; and that judge was the bishop, or, in grave cases, a provincial synod. If the bishop declared a layman a heretic, and sentenced him to death, the secular power then obtained the writ *de heretico comburendo* and burnt him; if the heretic was a clergyman, he was degraded by the bishop himself. Some have doubted whether a bishop alone could sentence to death; but certain provincial constitutions, and also the recital of the statute of Henry IV. c. 15, recognise this as within the bishop's authority.³ Yet the Crown had a discretion to issue this writ *de heretico comburendo*. And before the reign of Richard II. heretics were seldom burnt. The statute of Henry IV. made burning follow as of course the sentence of the bishop, or even of his commissary, and also gave the bishop power to arrest and imprison those suspected of the offence.⁴ And the bishop had this wild and unbounded jurisdiction till the statute of Henry VIII. repealed that Act and transferred the power of burning to the sheriffs in their tourns.⁵ Yet while the jurisdiction was vested in the bishop, the temporal court could interfere and rescue the heretic before judgment. This they did in one case, where all that the heretic said was, that "though excommunicated by the Archbishop of Canterbury, he was not excommunicated before God, and he had, notwithstanding,

and noisome all books, sermons, and ballads, whereby diversity of opinion and schisms arose. Printers, bookbinders, and booksellers, particularly of books in favour of the Anabaptists, and such crafty translations of the Bible as Tindal's, were liable to three months' imprisonment, and on a second offence to perpetual imprisonment. Ballads and songs for rebuking of men and setting forth of virtue were expressly excepted; and ladies, if noble and gentle, might read to themselves alone and not to others any texts of the Bible or New Testament.—34 & 35 Henry VIII. c. 1.

¹ Newman's Lect. Hist. 37. ² See further as to this, *post*, Chap. IX. ³ 1 Hale's Pleas of Cr. 391; 12 Co. 92. ⁴ 2 Hen. IV. c. 15. ⁵ 25 Hen. VIII. c. 14; repealed by 1 Ed. VI. c. 12.

is great plenty of wheat as his neighbours.”¹ And in another case, where all that the heretic said was, “that he was not bound to pay tithes to the curate of the parish where he dwelt,”² the courts of law interfered on the ground, that the ecclesiastical court’s jurisdiction was at an end, when it pronounced sentence and delivered up the heretic to the secular powers, and those courts insisted on the specific matter of heresy being set forth, and of reviewing it so as to see that it was a legal ground of judgment; “for it concerned life and liberty.”³ As Hale said, the temporal courts were not mere lacqueys to endorse whatever the ecclesiastical courts certified to them.⁴

Until the time of Henry VIII. there was nothing clearly laid down as to what was or was not heresy; and even then no further certainty was attainable, except that it was declared, that some specific statements were not, and others were, heresy. It was to be no longer heresy to speak against the authority of the Pope.⁵ It was next declared to be heresy to say, that, in the communion, after consecration, the bread and wine remained bread and wine still. And it was made not only heresy, but felony, to say that priests might marry, and that auricular confession was not necessary.⁶ After the reign of Henry VIII. Protestants and Roman Catholics had opportunities of burning each other as heretics, till Elizabeth repealed the preceding statutes, and thereby restored the common law.⁷ And the High Court of Commission being erected obtained jurisdiction to sentence heretics; but nevertheless the jurisdiction of the bishop and of the provincial council was not thereby taken away. And under this statute the writ *de heretico comburendo* was not issued as of course, but was in the discretion of the king and council. And forfeiture of goods and lands no longer was to follow on conviction. And though since the time of Elizabeth no further definition of heresy has been given by any statute, yet the writ *de heretico comburendo*, and all capital punishments in pursuance of ecclesiastical

¹ Keyser’s case; 5 Ed. IV. Rol. 143; 3 Inst. 42; Att.-Gen. v Pearson, 3 Meriv. 383. ² Warner’s case; 1 Rol. Rep. 110; 3 Inst.

2. ³ 2 Inst. 615, 623.

⁴ 1 Hale, Pleas Cr. 408.

⁵ 25 Hen. VIII. c. 14.

⁶ 31 Hen. VIII. c. 14.

⁷ 1 Eliz. c. 1.

censures, are utterly abolished.¹ And no means exist for ecclesiastical courts dealing with heresy except by excommunication; though clergymen guilty of heresy may still be deprived and degraded. But whenever such a charge is made, there must be great precision and distinctness in the accusation. The articles of charge must definitely state the opinions maintained and doctrines contravened, and the particular articles of religion or portions of the formularies containing those doctrines. And while the accuser is confined to the passages he sets forth as matter of accusation, the defendant may explain, from the rest of his work, the sense or meaning of the passage on which the charge is founded.²

The punishment of heretics.—The punishment of heretics seems to have been always severe. The early Church made it a rule not to eat or converse with heretics.³ And Theodosius punished some of them capitally.⁴ One of the earliest instances of burning for heresy is said to have occurred under Robert of France in the eleventh century.⁵ In this country it is said, that the first martyrs for heresy were thirty men and women who set up strange opinions in Oxford, and a council of the clergy there, in 1159, condemned them to be burnt in the forehead with a red-hot iron, whipped half naked through the streets, and left to die of hunger and cold.⁶ The reason given by Coke for burning being the appropriate punishment was, that it was an offence against the Eternal Majesty and a leprosy of the soul, requiring the offender to be cut off lest he poison others. Yet it was always competent to escape punishment by abjuring the heretical opinion.⁷ In the short reign of Mary it is said about 288

¹ 29 Ch. II. c. 9. ² Williams v Bp. Salisbury, 2 Moore, P. C. N. S. 375; Sheppard v Bennett, L. R., 4 Priv. C. 362. ³ Bing. Chr. Ant. b. xvi. c. 6. ⁴ Cod. Theod. b. xvi. tit. 5. ⁵ 1 Prescott's Ferd. 261; Sismondi, b. iv. c. 4.

⁶ 5 Henry's Hist. Gt. Brit. 338. It is said the first martyrdom in Scotland for religious opinions was that of Rereby at Perth in 1408.—2 Fordun's Scotichr. 441. The Emperor Charles V. decreed death and forfeiture of goods as the punishment of converts from the ancient faith. And in 1568 a decree of the Inquisition condemned all the inhabitants of the Netherlands to death as heretics.—2 Motley's Dutch Rep. 158.

⁷ 3 Inst. 43; Fuller's case, 12 Rep. 44.

were burnt for this crime.¹ In the time of James I. a Socinian suffered martyrdom at Smithfield, and that king resolved to make no more martyrs.² Even before the writ *de heretico comburendo* was abolished, the courts of law often dealt with heresy under the form of seditious or blasphemous libel. In 1665 Keach was convicted of a libel for publishing a book which advocated, that infants should not be baptized, and that Christ would reign on earth personally in the latter day. Hyde, C.J., said these points had all been settled by the Book of Common Prayer; and the sentence was imprisonment for a fortnight, to stand in the pillory with a paper on his head at certain times and places, to pay a fine of 20*l.*, and to see the book burned by the common hangman.³

Offence of contravening the Thirty-nine Articles and depraving the Common Prayer.—One specific ecclesiastical offence created by a statute of Elizabeth is that of any ecclesiastical person, or one holding an ecclesiastical living, advisedly maintaining or affirming any doctrine repugnant to any of the Thirty-nine Articles.⁴ The word “advisedly” means that the words are the deliberate act of the accused, and not a casual expression dropped inadvertently. The ecclesiastical court must construe the articles and ascertain the doctrines therein contained, and how far these have been contravened, in the same way as it construes statutes and written documents.⁵ The punishment is deprivation, and no other punishment can be imposed of a less serious description.⁶ And though the defendant might revoke his errors before sentence, yet he must do so entirely, and not merely express his regret that he should have committed “what

¹ 2 Todd's Cranmer, 417; 1 Hallam, C. H. c. 2.

² Fuller Cent. XVII. p. 64. In 1579 one Hammond was burned at Norwich for denying the Trinity. And in 1588 Francis Kett was burnt for opinions about Christ.—*Eliz. Relig. Hist.* 354. The last two men burnt for heretical opinions were Legat and Wightman in 1611.—1 Hallam, *Const. H.* 611; 2 Somers' *Tracts*, 400. “Perhaps the last capital punishment in a Protestant country for mere heresy was in Geneva in 1632.”—2 Hallam, *Lit. Eur.* 344.

³ *R. v. Keach*, 6 St. Tr. 710. It is also said, that in 1593 Sir T. Davers was committed to the Marshalsea for having, during his travels, kissed the Pope's foot.—1 *Nug. Antiq.* 291 (1804).

⁴ 13 *Eliz. c.* 12, § 2. ⁵ *Williams v Bp Salisbury*, 2 Moore, N. S. 377. ⁶ *Heath v Burder*. 15 Moore P. C. 1

the court says is an error," or that "he was not aware he was offending."¹ The object for which this offence was created is said to be the avoiding of diversities of opinions and the establishing of consent touching true religion, for it was considered that those articles were framed with great care by leading authorities of the Reformed Church, and contained fundamental truths deducible in their judgment from holy Scripture. A still better theory on which this offence is based is that which Lord Stowell stated, namely, that "the preaching of diversity of opinions shall not be fed out of the appointments of an established church."² This charge, however, of contravening the articles must be reasonably definite and specific, so that a court may know wherein the conflict exists, and which of the articles is contravened.³ One clergyman, in 1845, had his licence revoked in the first instance on account of doctrines which were said by him to be "maintaining all Roman doctrine," without explaining how much or how little of such doctrine he appropriated.⁴

Duty of Courts in interpreting Articles and Prayer Book.—In applying a law of this kind it is absolutely necessary that the court deciding on the offence should put a construction on the Articles of religion said to be contravened, for unless this is done it is impossible to know, whether there has been a contravention or not. And there are no peculiar rules of construction applicable to the Articles any more than there are to other written instruments of ordinary composition.⁵ And as may be supposed, some Articles, like most human compositions, are capable of different meanings, or a meaning indefinite, though indefinite within certain extreme limits.⁶ For example, it has been held, that the 6th and 20th Articles do not necessarily imply, that every part of the Scriptures was written under the inspiration of the Holy Spirit.⁷

¹ Ibid. ; King's Proctor v Stone, 2 Hagg. Cons. 430.

² King's Proctor v. Stone, 1 Hagg. Cons. 424. Persons reviling the sacrament with contemptuous words or otherwise were punished by fine and imprisonment.—1 Ed. VI. c. 1.

³ Heath v Burder, 15 Moore, P. C. 1 ; Williams v Bp. Salisbury, 2 Moore, N. S. 375.

⁴ Hodgson v Oakley, 1 Rob. Ecc. 322 ;

4 N. of C. 180. ⁵ Williams v Salisbury, 2 Moore, N. S. 375.

⁶ Noble v Voysey, 7 Moore, N. S. 167. ⁷ Williams v Salisbury, 2 Moore, N. S. 375.

And there is nothing repugnant to the Articles in expressing a hope of the ultimate pardon of the wicked.¹

Another kindred offence is the depravation of the Book of Common Prayer by any parson, vicar, or minister refusing to use it, or his using any other form of prayer.² And the punishment is imprisonment and loss of one year's profits of the benefice. Moreover, even a layman who depraves or despises anything in such Common Prayer, or compels or procures a parson to use other forms, incurs a penalty.³ And a clerk may be deprived for the first offence, for the ecclesiastical jurisdiction is concurrent.⁴ The clerk may also be suspended for three years, instead of following the punishment assigned by the statute of Elizabeth.⁵

Offences of Immorality, Drunkenness, &c., of Clergy.
—Though it might well be, that the clergy should be subject to greater restrictions and punishments than the laity as to certain offences recognised as pre-eminentlly incompatible with the sacred office, yet, until the statute of Edward I., the clergy were not punishable for these in their own courts; the king's courts, and especially the leets, having power to inquire into them. Express power was, however, conferred on the spiritual judge to punish the clergy for fornication, adultery, and such like.⁶ But fine and imprisonment were not ecclesiastical punishments, and Coke says, that no such power could be granted to ecclesiastical courts except by statute.⁷ And the statute of Henry VII. first gave power to the bishop to commit to prison priests convicted of incontinency.⁸ And though the ecclesiastical judge was apt to exceed his jurisdiction, the common law courts were always ready to issue a prohibition when the line was transgressed, and the matters were such as they themselves could sufficiently deal with; for example, when the spiritual court professed to bastardise the issue of an incestuous marriage instead of confining itself to the punishment of the incestuous person alone.⁹

¹ Ibid. ² 2 & 3 Ed. VI. c. 1, §§ 2, 3; 1 Eliz. c. 2, § 23; Canon (1603) 6. ³ Ibid. ⁴ Caudrey's case, 5 Coke, 1. ⁵ Sanders v Head, 2 Notes Cas. 355. ⁶ 13 Ed. I. st. 4; 2 Inst. 488.

⁷ 4 Inst. 324. ⁸ 1 Hen. VII. c. 7, repealed in 1840; 4 Inst. 329.

⁹ Harris v Hicks, 2 Salk. 548.

The canon of James I. extended the jurisdiction of ecclesiastical courts over the clergy when they offended as to adultery, disorderly conduct, drunkenness and swearing, and ribaldry, and even usury.¹ In 1787 a statute prohibited any suit in the ecclesiastical court for fornication or incontinence if not brought within eight months, or if the parties had subsequently intermarried.² And yet this was held not to prevent a bishop from punishing an incontinent clerk irrespective of that Act.³ Besides the canon already referred to, which made the clergy punishable in the ecclesiastical courts for adultery, swearing, and drunkenness, another canon went a much greater length, and prohibits the clergy from resorting to a tavern, or giving themselves to any base or servile labour, or playing at cards.⁴

Celebrating public worship in another parish or another chapel.—It was a very early rule in the Church, that no bishop should invade the parish or diocese of another, but must keep to the government of the people committed to his care.⁵ No doctrine of ecclesiastical law was more resolutely upheld than this, namely, that in each parish the incumbent of the church has the exclusive right to perform the services of the Church, and any other clergyman who invades the parish for a like purpose without leave of such incumbent commits an ecclesiastical offence.⁶ And the leave of the bishop is ineffectual, if the incumbent refuses it.⁷ Even the incumbent of the parish was held incompetent to officiate in a proprietary chapel, though he drew a yearly stipend from the proprietors, it being deemed essential that such chapel should be first consecrated, and when it is unconsecrated the bishop can at discretion prohibit any worship being celebrated

¹ Can. 1603, No. 109. So late as 1757 a Methodist preacher was for incontinence sentenced to penance by the Arches Court.—*Wheatley v Fowler*, 2 *Lee*, 376.

² 27 Geo. III. c. 44. ³ *Burgoyne v Free*, 2 Bligh, N. S. 65.

⁴ Can. 1603, § 75. Another canon even hints at decent apparel being also compulsory.—*Ibid.* § 74. ⁵ Theod. Can. A.D. 673; 1 Wilk. 41. ⁶ *Bliss v Woods*, 3 Hagg. Eccl. 486; *Williams v Brown*, 1

Curt. 53.

⁷ *Carr v Marsh*, 2 Phillim. 198. But a lay rector cannot interfere.—*D. Portland v Bingham*, 1 Hagg. Cons. 157.

therein, by any of the clergy of the Church of England.¹ The bishop cannot license such chapel without the incumbent's consent, nor is the incumbent's consent sufficient without the bishop's licence.² To allow another officiating minister in a parish without the incumbent's consent is deemed to interfere with the pastoral duties and also pecuniary rights of such incumbent, and produces schisms and dissensions.³ Thus in strictness, the consent not only of the incumbent of the parish but also of the bishop is required to justify a clergyman, who is a stranger, in performing divine service in such parish, for a bishop of one diocese can at discretion, without cause assigned, inhibit a beneficed clergyman of another diocese officiating or preaching in his own diocese.⁴ And if the service is to be performed in an unconsecrated building the bishop has, as already stated, an absolute discretion to prohibit it.⁵ It was thought, indeed, that after the Toleration Act a minister of the Church of England had the same freedom as dissenting ministers, to preach and do any good of that kind in any locality; but Lord Hardwicke, L.C., in 1742, corrected this mistake. He said the Act of Toleration was made to protect persons of tender consciences and to exempt them from penalties; but to extend it to clergymen of the Church of England who act contrary to the rules and discipline of the Church would introduce the utmost confusion.⁶

¹ *Moysey v Hillcoat*, 2 Hagg. Eccl. 30; *Hodgson v Dillon*, 2 Curt. 388; *Barnes v Shore*, 8 Q. B. 640.

² *Ibid.*; *Freeland v Neale*, 1 Rob. Eccl. 643. So late as the year 1863 it was necessary to pass an Act of Parliament to authorise the bishop without consent of the incumbent, and, even then only on further conditions, to permit an English service in a chapel in a Welsh parish.—26 & 27 Vic. c. 82.

³ *Bliss v Woods*, 3 Hagg. Eccl. 512.

⁴ *Bp. Down v Miller*, 11 Ir. Ch. Ap. 1. It was in 1739 that Wesley, a priest of the Church of England, openly rebelled against the Bishop of Bristol, who had ordered him to quit his diocese, and took to the practice of field-preaching.—1 *Southey's Wesley*, 226, 243; *Wesley's Journ.* 78. And "having the genius of Richelieu for government," he organised a body of nonconformist clergy, who are now a conspicuous power in modern society.—*Macaulay's Essays*.

⁵ *Hodgson v Dillon*, 2 Curt. 388; *Sedgwick v Bp. Manchester*, 38 L. J., Ecc. 30.

⁶ *Trebec v Keith*, 2 Atk. 500.

Preaching in private houses and buildings.—The 71st canon expressly prohibited any minister from preaching or administering the holy communion in any private house except in times of necessity. And this necessity was explained, namely, where any one was so impotent as to be unable to go to church, or was very dangerously sick. And a private house was defined to mean a house wherein no chapel was dedicated and allowed by the ecclesiastical laws of the realm; and even the chaplain was prohibited from preaching except in the chapel of such house. The avowed object of all this was to compel people to go to their parish church, and the punishment was suspension for the first offence, and excommunication for the second. A private house in short was held to mean strictly a dwelling-house, and hence would not include a dissenting or unconsecrated chapel, so as to save a priest who there officiated from committing a breach of Church discipline.¹ Moreover, by the Act of Charles II. no person was allowed to have divine service performed in his house if there were more than five persons present besides the family.² This number was, with great difficulty, afterwards extended to twenty, above which number the place was to be certified and registered,³ and those who permitted such meetings in uncertified places incurred a penalty, not less than 20s. and not greater than 20*l*. All places of religious worship of Protestants, other than those of the Church of England, required to be registered by the same statute of 1812.⁴ But in 1855 the necessity of registration of places of religious worship was no longer required when the incumbent of the parish church or his curate, or some one authorised by them, conducted the worship; or when the congregation or assembly met in a private dwelling-house, or on the premises belonging thereto; or when the congregation or assembly met occasionally in any building not usually appropriated to purposes of religious worship.⁵

Various kinds of punishment of the clergy.—The clergy, besides being liable, both civilly and criminally, in all courts to the same remedies and punishments as the laity, are subject to various punishments peculiar to their

¹ *Barnes v Shore*, 1 Rob. Eccl. 382; 8 Q. B. 640. ² 22 Ch. II. c. 1. ³ 52 Geo. III. c. 155. The fee was 2*s*. 6*d*. ⁴ 52 Geo. III. c. 155, § 2. ⁵ 18 & 19 Vic. c. 86.

own profession. These vary in degree from simple admonition to imprisonment and deprivation. Admonition is a mere caution or warning, but disobedience to it amounts to a contempt of court. Suspension is either from office alone, or from office and benefice. The former indicates that the suspended person is prohibited from discharging spiritual functions: while the latter adds the further prohibition against receiving the fruits of the benefice. And at the end of the term of suspension a certificate signed by three clerks is sometimes ordered to be produced attesting the reformation of the offender. Sequestration of the profits of the benefice is either a punishment *per se* or added to suspension. Deprivation is the entire dissolution of the connection between the clerk and his benefice and its functions, so that he can neither officiate in it nor enjoy the emoluments. And sometimes to this is added a prohibition to officiate within the limits of the depriving authority. The writ of excommunication was also the mode of enforcing sentences. These punishments require to be noticed in their order.

Excommunication as punishment.—The punishment of excommunication, which was so formidable a weapon of priestly influence in the middle ages, has lost all its rigour in modern times,¹ and it has been turned into a mere mode of imprisonment for six months.² This writ *de excommunicato capiendo* was said by Coke to be matter of discretion on the part of the king,³ though the ecclesiastical lawyers claimed that it was *ex debito justitiæ*, and that the king could not withhold it.⁴ A statute of Elizabeth was passed to make the writ *de excommunicato capiendo* more strictly enforceable, and to make the sheriff more easily brought to account for neglecting to arrest the offender. And the cause of the excommunication was to be specified in the *significavit*.⁵ But after the lapse of about two centuries it was abolished, except to this extent, that when a decree or order of the ecclesiastical court was disobeyed, and that court certified or made a *significavit* of the same to the Chancery division within ten days thereafter, a writ *de contumace capiendo* may issue from such division having the same force as the writ *de*

¹ See 2 Pat. Com. (Pers.) 240.

² 53 Geo. III. c. 127.

³ 2 Inst. 630. ⁴ Lind. 351.

⁵ 5 Eliz. c. 23, § 13.

excommunicato capiendo under the statute of Elizabeth, and the sheriff is bound to execute the writ by arresting the contumacious party.¹ This writ may be issued against a person residing anywhere in England or Ireland.² But if the contumacious person is a peer or member of Parliament, the writ *de contumace capiendo* is not to be issued, but only a writ of sequestration against the estate or the goods.³ And a power has been expressly conferred on the Ecclesiastical Court or Judicial Committee of the Privy Council after the imprisonment of the contumacious person to release him at any time with consent of the other parties to the suit.⁴

Suspension as a punishment.—The punishment of suspension is that which usually is most effective, and is a prohibition against the incumbent exercising his spiritual functions. The sentence of itself operates to incapacitate the party from reaping the emoluments of the benefice, whether a sequestration be issued or not.⁵ The care of the benefice is then devolved on the bishop, so as to provide for the needs of divine worship while the suspension lasts.⁶ If the clergyman preaches or performs clerical functions during the suspension, or otherwise disobeys any monition, he is guilty of contempt, and is liable to be suspended *ab officio et beneficio*.⁷ One characteristic of the sentence of suspension is, that before it can be pronounced the offender must have a previous admonition, otherwise it is good cause of appeal.⁸ There seems to be no defined limit to the period of suspension, but it is usually confined to short periods of a few months, extending to two or three years. One peculiarly barbarous form of suspension was once applicable to the laity as well as the clergy, which consisted in excluding the offender from entering a church at all—called suspension *ab ingressu ecclesiæ*. This punishment, like a minor excommunication, was founded apparently on the notion, that the offender was so bad, that he should not have even a chance of hearing anything more for his benefit. It is true the courts seem to have pronounced this sentence only in suits

¹ 53 Geo. III. c. 127, §§ 1, 2, 3.

² 2 & 3 Will. IV. c. 93, § 1.

³ *Ibid.* ⁴ 3 & 4 Vic. c. 93.

⁵ *Morris v Ogden*, L. R., 4 C. P. 687; *Bunter v Cresswell*, 14 Q. B. 825.

⁶ *Re Thakeham*, L. R.,

12 Eq. 494.

⁷ *Martin v Mackonochie*, 4 Q. B. D. 697.

⁸ *Gibs*. 1046.

for brawling, which may be presumed to suggest some kind of surety of the peace such as this punishment implied.¹ The punishment was expressly authorised by the statute of Edward VI.,² and no statute has yet expressly repealed the power to inflict such punishment, and which the ecclesiastical court probably still claims.³

Sequestration as a punishment.—The sentence of sequestration is a mode of appropriating the whole profits of the benefice to other uses than those of the incumbent, but always subject to adequate provision being first made for public worship. The bishop acts in such a case in a manner similar to the sheriff in ordinary cases of debtors in possession of real or personal estate.⁴ Sequestration may be made to reach the clergyman's estates out of the jurisdiction.⁵ But the debts of the clergy are not allowed to interfere with the services of the Church, so that while a clergyman's benefice must answer for his debts, like the estate of a layman, care is always taken first to keep up the ministrations of the Church, and to set apart a sufficient sum out of the emoluments for that primary object.⁶ Hence, instead of the sheriff executing writs of common law courts against the benefice, it is for the bishop to nominate a fit person to be the sequestrator. And when an incumbent is made bankrupt, the sequestrator may allow part of the profits to the bankrupt for performing the duties of the parish.⁷ The duty of a sequestrator is to gather the tithes, fruits, and profits, and keep a just account; and he publishes his appointment in the church, so that all may know his position. The duties are now regulated to some extent by statute.⁸ If the sequestration remains in force for more than six months, the bishop may inhibit the incumbent from performing clerical service, within the diocese so long as the sequestration lasts.⁹

¹ *Clinton v Hatchard*, 1 Add. 96; *Lee v Matthews*, 3 Hagg. Ecc. 175. ² 5 & 6 Ed. VI. c. 4.

³ The Council of Laodicea solemnly decided that heretics ought not to be admitted into a church.—*Concil. Laod.* c. 6. Nevertheless, some churches had the good sense to avoid the rule.—*Bing. Chr. Ant.* b. xvi. c. 6.

⁴ Jud. Act 1875, Apx.; 1 & 2 Vic. c. 106, §§ 54, 99; 12 & 13 Vic. c. 67; 34 & 35 Vic. c. 45. ⁵ 2 & 3 Will. IV. c. 93. ⁶ 32 & 33 Vic. c. 71, § 88. ⁷ 32 & 33 Vic. c. 71, § 88. ⁸ 34 & 35 Vic. c. 45. ⁹ *Ibid.* § 5.

Deprivation as a punishment.—The highest punishment of the same kind is deprivation, which totally deprives the incumbent of all further connection with the benefice, being in effect a perpetual suspension. It is a punishment assigned for disqualification, blasphemy, felony, and the graver moral offences.¹ Indeed, conviction for felony or treason *ipso facto*, if the punishment exceed twelve months' imprisonment, operates as an avoidance of a benefice.² This heavy punishment of deprivation can be pronounced by the Dean of the Arches sitting by himself.³ Deprivation is now always substituted for the old punishment of degradation.⁴ But most of the grounds at common law have been displaced by statutory methods which intercept the evil at an earlier stage. Thus, mere illiteracy, want of age, simony, conviction of treason or felony, are disposed of by statutes. It may be decreed for incontinence and drunkenness.⁵ Blasphemy, heresy, schism, are also grounds for the punishment.⁶ Speaking, or preaching, or using rites or ceremonies in derogation of the Prayer Book is, on a second conviction, made by statute *ipso facto* a deprivation.⁷ And other statutes often prescribed this punishment.

There was also the punishment of degradation, which was the stripping from an ecclesiastic the sacred orders, a punishment now never resorted to, simply because the others amount practically to the same thing. It was done solemnly and publicly, and was purposely accompanied with marks of disgrace.⁸

Punishment for contempt of Ecclesiastical Court.—A contempt of an ecclesiastical court is committed in the

¹ Noble *v* Voysey, L. R., 3 Priv. C. 357; Bonwell *v* Bp. London, 14 Moore, P. C. 395. ² 33 & 34 Vic. c. 23, § 2. ³ Bonwell *v* Bp. London, 14 Moore, P. C. 395. ⁴ Claster *v* H., 1 Robertson, 380.

⁵ 1 Brownl. 70; 2 Brownl. 37. ⁶ 29 Ch. II. c. 9. ⁷ 2 & 3 Ed. VI. c. 1, §§ 2, 3; 1 Eliz. c. 2, §§ 2, 3.

⁸ The ceremony survives in the popular expression—pulling the man's gown over his ears. The canon law added other grounds of degradation. Marriage or concubinage was deemed sufficient; and even a contumacious wearing of an irregular habit.—*Lindw.* 122, 127, 128.

One serious doubt disturbed the canonists as to this sentence, namely, how many bishops ought to be present and assisting at a degradation. It was agreed, that if the person degraded was a bishop, twelve others should be present; but if he was only a presbyter, then six should suffice.—*Ayliffe, Par.* 207.

same circumstances as contempt of any other court. But as an ecclesiastical court is not a court of record, it cannot by its own powers carry out the punishment by imprisonment. Yet the same thing is done circuitously by the Court of Chancery issuing the necessary process called a writ *de excommunicato capiendo* on a certificate or *significavit* of the ecclesiastical judge. And there is power afterwards with consent of the other party to release the party from imprisonment.¹ A peculiar practice exists in these courts, which consists in adding a monition to a sentence for any of the ordinary offences, and when this monition is disobeyed the court can, on affidavit and in a summary way, without any fresh suit commenced, sentence the contumacious person to suspension.²

Penance as a punishment.—Penance was the familiar punishment imposed by the Church for most of the offences, being founded on the same views of human nature and conduct as the pillory and stocks for civil offences. The chief difference was, that the civil court left the offender to contempt, careless as to what his thoughts may be, whereas the Church used penance as a mode of bringing about a public display of penitence. There was, however, also a private penance, consisting of contrition coupled with a confession of the mouth. The ceremony was even treated as a sacrament, and consisted in the offender putting on a certain garment and making an open acknowledgment of his fault in church; but a more solemn form of it was performed by the penitent going barefooted and clothed in sackcloth. It was deemed part of the correct discipline in early times not to re-admit penitents except in a public manner; and they were bound with solemn prayers and tears to stand at the altar clothed in sackcloth, the virtue of sackcloth being discovered by the first Council of Toledo.³ And if the offence was very notorious and scandalous, the absolution was given still more publicly in presence of the whole people before the reading desk.⁴ The better class of Christians were once all agreed, that the humiliation of a penitent must be sufficiently public.

¹ 53 Geo. III. c. 127; *Hudson v Tooth*, 2 Prob. Div. 125.

² *Martin v Mackonochie*, 4 Q. B. D. 697. ³ Concil. Tolet. I. c. 2.

⁴ Concil. Carth. III. c. 32.

⁵ Cave's Prim. Chr. P. 3, c. 5. In China, the Buddhists atone for

The Ecclesiastical Court all along claimed the privilege of commuting such a punishment for a fine, or rather the delinquent could claim this commutation as a right;¹ and these commutations brought great profit to the Church till the time of the Reformation. But the scandal of allowing money to be substituted for corporal penance in case of notorious sins long haunted the Church and its archbishops. In 1597 a solemn convocation of the Province of Canterbury ordained, that it should only be allowed with the bishop's leave, and the money was to be given to the poor of the parish or other pious use.² And the canons of 1640 kept up the ancient prejudice against letting off offenders with a fine, unless the bishop was privy to it.³ Even so late as the time of Queen Anne, the convocation made a regulation, that no commutation of penance should be deemed valid without the express written consent of the bishop; and a faithful register was to be kept of what was done with the money, the destination of which seems to have been deemed a difficult problem.⁴ The Ecclesiastical Court still keeps up the form of reserving this punishment in its armoury. But Lord Stowell, in 1804, somewhat ostentatiously seized upon the excuse of the offender's age and infirmity for remitting the sentence of solemn penance for incest.⁵ In 1816 a party was ordered to perform penance in the parish church during divine service, so that most of the congregation might see and hear the same.⁶ In another case, in 1828, the court did not go further than enjoin a penance of asking forgiveness of the aggrieved party in the vestry-room in presence of the clergyman and churchwardens; but the form of retractation was at the same time compelled.⁷ In 1835 the judge took upon himself to remit the penance altogether as part of the sentence.⁸ Courts of law in modern times have sometimes been asked to discharge or otherwise protect defendants against irregularities in the attempt to enforce this barbarous punishment of penance. In one case, in 1823, the

their sins by expending large sums in highway repairs.—1 *Gray's China*, 128.

¹ 9 Ed. II. c. 2.

² Ayliffe, Par. 414.

³ Gibs. Cod. 1045.

⁴ Gibs. 1046.

⁵ *Burgess v Burgess*, 1 Hagg. Cons. 393.

⁶ *Blackmore v Burder*, 2 Phillim. 362.

⁷ *Courtail v Homfray*,

2 Hagg. 1.

⁸ *Chick v Ramsdale*, 1 Curt. 36.

defendant was ordered to perform "the usual penance," but he was not told what that was, and the court of law released him from imprisonment on that account.¹ In another case, however, in 1838, when he had been ordered to go to the minister's house and make a confession, though a common law court was asked to say this was illegal, and the defendant said he would be a trespasser if he went into a stranger's house, the process was left undisturbed, it being chiefly a question of costs.² And though no court will in future be likely to repeat such a sentence, the power to do so has never yet been expressly repealed.

Peculiarities in offences of clergy.—In criminal suits against the clergy one characteristic is found which did not belong to ordinary prosecutions in civil courts, much less in criminal courts, which is this, that if a criminal is found guilty he pays the whole costs, and if he is acquitted or discharged then the promoter pays his costs, though the matter has always been in the discretion of the court.³ But a still greater peculiarity is, that the bishop has an entire discretion as to allowing a clergyman to be prosecuted for any criminal offence under the Church Discipline Act.⁴ Another peculiarity of punishment for an ecclesiastical offence is, that as the punishment is deemed mostly only a mode of inducing a penitent state of mind, any ecclesiastical court has power at any time to order the release of the prisoner; and this again is only allowed on condition that the other party consents.⁵ But the court seems to insist, that the clerk shall not set up the excuse that he did not know he was offending against the law, and for no better reason than the maxim, that everybody is bound to know the law; moreover, the court seems not satisfied with an acknowledgment, that the party will not offend in future, but derives satisfaction from making the offender humble himself.⁶ This revocation of error must be made expressly and unreservedly.⁷

¹ R. v Maby, 3 D. & R. 570. ² Kington v Hack, 7 A. & E. 708.

³ Bennett v Bonaker, 3 Hagg. Eccl. 56; Burder v Hodgson, 4 Notes of C. 492. ⁴ Julius v Bp. Oxford, H. L. 23 March, 1880.

⁵ 3 & 4 Vic. c. 93, § 1. ⁶ Proc.-Gen. v Stone, 1 Hagg. Cons. 424. ⁷ Heath v Burder, 15 Moore, P. C. 1.

CHAPTER IX.

TOLERATION AND DISSENTERS.

Intolerance is a law of nature.—If the law of nature be a law, which existed as a system of positive rules at some antecedent stage in the progress from barbarism, or if it ever was a historic fact in any age, then the law of intolerance is part of the law of nature.¹ There is no country or age recorded until the seventeenth, or rather the eighteenth century, in which it was not deemed the highest wisdom and the most divine justice, that he, who had satisfied himself of the truth of his creed and form of worship, and had power over others, should insist on these others making themselves equally satisfied also; and on their professing that they could not, or would not do so, should burn them alive or imprison them, or strip them of their property, or deprive them of some means of happiness and comfort, or at least make them in some way feel their inferiority for not thinking and believing what they were told. It scarcely occurred even to those who had the earliest tincture of civilisation, that it was possible for two human beings of different faiths to inhabit the same country without fighting to the last extremity, till the heresy of the weaker party should be utterly extinguished. That two persons could stand at arms' length, each resolute in denying what the other affirmed, and each becoming the more convinced, as the other grew more confident that such conviction was wrong,—that they could each go about his own business without first coming to extremities about their opposing creeds has been the discovery of a very recent age, and attained only after centuries of experience and reflection.

¹ As to the law of nature, see 1 Pat. Com. (Pers.) 99.

All governors confessed to some inexplicable impulse towards orthodoxy, as if some law of moral gravitation drove themselves—and yet not without driving all others also at the same time—towards one and the same central goal. Intolerance or persecution is as clearly the natural condition of barbarians as toleration is that of civilisation; but the progress from the one to the other has been tortuous, reluctant, and long drawn out.

The ancients on toleration.—The ancients were unsparing in their malignity towards heretics.¹ Plato said that he, who would not submit to the established religion must die or suffer stripes and bonds, or privation of citizenship, or loss of property or exile;² and Plato's doctrine ruled the world till the end of the seventeenth century. The Athenian law punished with death the introduction of new deities.³ Socrates was made to drink poison for this alleged crime, or at least for attacking the established religion.⁴ Anaxagoras was prosecuted by Cleon for impiety in saying nothing more than that the sun was a fiery ball of iron.⁵ Anacharsis was put to death by his fellow-countrymen in Scythia, because, having been an intelligent traveller, after returning home he performed rites to foreign gods; and the same fate befell Scyles for performing rites to Bacchus and wearing Greek clothes.⁶ The works of Protagoras were publicly burnt, and himself banished, because he declared that he could not make out, whether there were gods or not.⁷ Alcibiades was condemned and his goods confiscated for making light of the ceremonies of Ceres and Proserpine.⁸ The Romans also prohibited all new gods and new rites of worship.⁹ Suetonius says Tiberius zealously checked those practising foreign rites, and on that account Suetonius viewed him as a masterly governor.¹⁰ Paulus said such persons were banished or

¹ The laws of Menu prohibited the people under the cruellest penalties from acquiring knowledge. If any one were to listen to the reading of the sacred books, burning oil was to be poured into his ears; and if he committed to memory what he heard he was to be killed.—*Wilcoff, Civ.* 2.

² Plato, *Leg.* b. x. ³ Butler's *Rom. L.* 168. ⁴ Xen. *Mem.* b. i. c. 1. ⁵ Diog. *Laert.* Anax. ⁶ Herod. b. iv. ⁷ Diog. *Laert.* 139, §§ 51, 52. ⁸ Plut. *Alcib.* ⁹ Cic. *de Leg.* b. ii. 8, 19; Livy, iv. 30, xxv. 1. ¹⁰ Suet. *Tib.* § 36.

put to death because they disturbed weaker minds.¹ Trajan thought that he who refused to sacrifice to the gods should be punished with death. The Romans also burnt magicians alive, and those aiding them were crucified.² The Christians in their turn were, in the early centuries, punished as atheists, or as sorcerers, or magicians, or as given to superstition.³

The early Christians on toleration.—Bacon says that the quarrels and divisions about religion were evils unknown to the heathen ; the reason was, because the religion of the heathen consisted rather in rites and ceremonies than in any constant belief.⁴ This may be true as regards large bodies and sects as contrasted with isolated thinkers here and there. The code of Leviticus as to idolaters seems to have been assumed in the early ages of Christianity without any question to be applicable to all ages and circumstances. And it was considered easily adapted to those who were deemed tainted with heresies and dissent. The early Church had an instinctive notion, that there ought to be one faith only, and that variety of customs was a scandal.⁵ And they all agreed that attendance at church ought to be compulsory, and non-attendance to be punished.⁶ Constantine forbade heretics to meet in public or private, to perform acts of religion.⁷ And all heretical books were to be burnt. The first edict against the Christians ordered every one who refused to offer sacrifice to be burnt alive, and that their churches should be demolished to the foundations.⁸ This persecution was carried out with racks and scourges, with iron hooks and red-hot beds, and with all the variety of tortures which fire and steel, savage beasts, and more savage executioners, could inflict on the human body.⁹ In the fourth century the Council of Carthage had arrived at the clear conclusion, that all schismatics, who died outside of the Catholic Church, were doomed to eternal fire.¹⁰ Here and there, but only fitfully, one of the fathers showed an uncertain glimmering of the doctrine of toleration.¹¹ It was not to be wondered, that, when the Church

¹ Paul. Sent. 5; 23, 17. ² Ibid. ³ Euseb. b. iv. c. 15 ; Suet. Nero ; Tacit. Ann. b. xv. c. 44. ⁴ Bac. Ess. ⁵ Concil. Tolet. IV. c. 2. ⁶ Bing. Chr. Antiq. b. xvi. c. 8. ⁷ Euseb. Vit. Const. iii. 64. ⁸ A.D. 303, Mosh. Ch. Hist. ⁹ Gibbon, Rome, c. 16. ¹⁰ 1 Palmer on Church, 13. ¹¹ Whitby on Heretics ; Jer. Taylor's Lib. Proph.

succeeded to civil power, and obtained the ear of kings and emperors, the principle should be acted on of the burning of heretics, and at a later stage of varied penalties for nonconformity and of disabilities of many kinds. The Theodosian code by means of penalties and disabilities attacked those who worshipped with pagan rites in temples their false gods.¹ The great champion of the doctrine of pursuing heretics with fire and sword, and for thereby propagating Church doctrines, was St. Augustin, who is generally understood to be the chief instructor of those who considered it the duty of civil governments to compel citizens to become good churchmen. Persecution and intolerance were soon systematically enforced with unhesitating faith as the only true mode of governing men. Near the close of the fourth century bishops began publicly to preside at the execution of heretics.² And they long felt it a point of duty and honour to deliver up heretics to be punished by the civil power. And soon after the Inquisition was established in 1208 the Fourth Council of the Lateran enjoined all rulers to swear a public oath, that they would labour earnestly to exterminate heresy.³ And the Bull of Innocent III. threatened with excommunication any prince, who failed in this duty. The brutality of this spirit was illustrated by the Holy Inquisition in 1568, which sentenced three millions of men, women, and children, of the Netherlands to the scaffold.⁴ And so entirely was the spirit of persecution part of the daily life of all forms of religion, that when Protestants had the power they were equally unconscious of the folly and criminality of exterminating their own heretics, forgetful of the situation they themselves had once filled. The right and duty of the civil magistrate to punish heresy was an accepted axiom of most of the Protestant confessions. Luther, Calvin, Beza, and Knox, all treated it as an elementary axiom of faith.⁵ When Calvin burned Servetus for his opinions concerning the Trinity, the leading Reformers

¹ Theod. Code de Templis. ² 3 Milman, Hist. Christ. 60.

³ It was singular that the laws of Zenghis Khan allowed perfect toleration: A.D. 1206-27.—*Gibbon's Rome*, c. 64.

⁴ 2 Motley's Dutch Rep. 155. ⁵ Neal's Purit. 147; 1 Palmer on the Church, 380; C. Lewis, Infl. Auth. 292; 2 Hallam, Lit. Eur. c. i. § 29; 3 *ibid.* iii.; 1 Hallam, Const. H. 182.

praised his admirable wisdom and zeal.¹ Zuinglius alone seemed to repudiate this favourite dogma of relentless persecution towards the unbelieving.² The Treaty of Westphalia, after the Thirty Years' War, at last seemed to embody the conviction, that it was scarcely the business of governments to set up one form of religion. And it is usually confessed, that the received doctrine in Christian Europe, till the age of the Reformation, treated religious error as a crime and heresy to be punished like homicide and theft. Conformity—exile, or death, was the alternative.³

English statutes of intolerance before William III.

—Before 1539 the bishops and clergy by means of excommunications and other terrors sufficiently potent brought about a kind of uniformity in faith and practice, like their neighbours throughout the world. In that year, after Henry VIII. had consulted the ripest wisdom of convocation, the Act of the Six Articles, called the Bloody Statute, enacted, that those who did not believe certain doctrines laid down, of which transubstantiation, celibacy of the clergy, and auricular confession, were three, would be treated as heretics; and it subjected to imprisonment and fine all those who refused or abstained from communion; and a second offence was declared felony.⁴ Various statutes of Edward VI. and Elizabeth, still continuing to deal with the wicked and dangerous practice of seditious sectaries, ended by enacting, that those above the age of sixteen who abstained for a month from attending some church to hear divine service, or who persuaded others not to attend or receive the communion, or who by enticement or allurements, or otherwise, were present at a conventicle under colour or pretence of any exercise of religion, should, after conviction, be committed to prison, there to remain till they made open submission of their conformity, and if they were obstinate for three months more they were to abjure the realm, otherwise to be deemed felons without benefit of clergy.⁵ Under the Act of James I. any bishop or two justices might call upon any person above eighteen whom they met in the street, or who was passing through the county and unknown, to state on oath, whether he was

¹ Mackenzie's Calvin, 79. ² 1 Lecky, Rat. 420. ³ C. Lewis, Infl. Auth. 292. ⁴ 31 Hen. VIII. c. 14. ⁵ 35 Eliz. c. 1.

a recusant, *i. e.* neglected to repair to church, and might commit him to prison till the assizes or quarter sessions; and he was then tried, and if he still refused to answer or to take an oath that he detested the pope and other things, he incurred a premunire, that is to say, forfeited all his property, and was liable to imprisonment for life. And to keep or harbour one who neglected to go to church was a ground of forfeiture of 20*l*.¹

The Corporation Act of 1661 made it necessary, that all who bore offices of magistracy or places of trust in a corporation should first take three oaths, and if within a year before being elected or chosen they had not taken the sacrament according to the rites of the Church of England, their election was to be void.²

The Conventicle Act of 1664, passed at the instance of Lord Clarendon to stop the growing and dangerous practices of seditious sectaries, made every meeting of more than five persons (besides the family of the house) held for religious purposes, and not in accordance with the liturgy of the Church of England, to be a seditious and unlawful conventicle, and any person taking part in it was punishable by fine or imprisonment, and on a third offence by transportation for seven years to his Majesty's plantations. And if the sheriff did not see them, or at least cause them

¹ 3 Jas. I. c. 4; *R. v Crook*, 6 St. Tr. 202; *R. v Fell*, *ibid.* 634. This statute was expressly repealed in 1846, 9 & 10 Vic. c. 59, § 1.—In 1660 Bunyan was arrested and imprisoned for seven weeks, then tried on an indictment at Bedford Quarter Sessions, charging him with devilishly and perniciously abstaining from coming to church to hear divine service, and with being a common upholder of several unlawful meetings and conventicles, to the great disturbance and distraction of the good subjects of this kingdom. He was sentenced to prison for three months, and if he did not then attend he was to be banished. The sentence of banishment was never executed, but he was detained in prison from sessions to sessions. At last he was released by the Bishop of Lincoln on taking two bail that he would conform in half a year.

So Baxter, after being in prison six months, was released owing to a flaw in the commitment.—1 *Baxter, Works*, 105.

² 13 Ch. II. st. 2, c. 1.—This Act was aimed at Nonconformists, whose chief strength lay in towns. After 1715 if the unqualified person entered into office without the objection being taken he must be removed within six months, in order to void the election.—5 Geo. I. c. 4. No penalty, however, was incurred beyond avoiding the election.

to be actually embarked for that destination, he forfeited 40*l*. And at any moment the justices might break open the house where such conventicle was held.¹ A little later even to meet in a field or place was subject to the same penalty, and to preach there was to incur a penalty of 20*l*. And every constable who did not give information of such meeting incurred a fine of 5*l*.² Moreover, in 1665, any person who preached in conventicles or meetings, who came within five miles of a town which sent members to Parliament, or of a parish or place where he had been once parson, and who did not take an oath abhorring the traitorous position of taking up arms against his Majesty, and binding him not to endeavour any alteration of government in Church or State, incurred a penalty of 40*l*.³

In 1673, by the Test Act, all persons holding civil or military offices or places of trust under the Crown must take certain oaths, and also the sacrament according to the usage of the Church of England, within six months after admission to the office.⁴ And for neglect the office was avoided, and also penalties incurred; but a few inferior offices were expressly excepted. The doctrine of the law before the Toleration Act, and indeed till 1767, was, that it was one's own fault, if he could not take the sacrament, and his refusal or neglect was no excuse or defence.⁵ The court said, that to plead that kind of excuse was as idle as for a man to plead that he was a fool, or when he was excommunicated to plead, that that sentence disabled him instead of making it his business to remove the sentence. Thus all dissenters were treated as if they had it in their power to avoid the penalty by taking the sacrament, and were not allowed to set up their scruples as an excuse.

The Toleration Act of 1688.—During the century preceding 1688, divines and philosophers had begun more and more to reflect on the tyranny, absurdity, and impotence of all these statutes of intolerance—a result which was said to be greatly facilitated by the opportunities each rival and discordant sect of Christians had had of oppressing each other alternately. By the invaluable

¹ 16 Ch. II. c. 4. ² A.D. 1670, 22 Ch. II. c. 1. ³ 17 Ch. II. c. 2.
⁴ 25 Ch. II. c. 2. ⁵ (1694) *R. v. Larwood*, 1 L. Raym. 29;
4 Mod. 269.

experience long acquired in watching others doing to them what they were ready to do to others when they had the power, yet which they did not like to submit to themselves, the minds of leading men were opened and their eyes purged. Historians have endeavoured to discover who was the first leader of bodies of men who became possessed of the cardinal principle of toleration, which, like the discovery of a moral law of gravitation, explained phenomena, taught the idleness of fighting against the invincible, and led on the art of agreeing to differ.¹

The Toleration Act of 1688, reciting the Acts of Elizabeth, James I. and Charles II., relating to penalties for not attending church, or for lecturing and preaching without signing the Thirty-nine Articles, enacted that the Acts should not extend to persons dissenting from the Church of England, provided they took certain oaths and declarations as to the Trinity, the Scriptures, supremacy and allegiance, and on such oaths being taken they should be exempted from the pains, penalties, or forfeitures. And it was specially declared, that, if any assembly of dissenters should be held with the doors bolted, they should not have the benefit of the Act. Dissenters who had scruples about taking the oaths for the compulsory offices of constables, churchwardens, and overseers, might now serve the same by deputy. And those "pretended" dissenting clergymen, required to subscribe the articles of religion, might omit

¹ Historians have differed as to when Dissent or Nonconformity took possession of large bodies of men as a settled faith. Some say those who objected to transubstantiation under the Bloody Statute of Henry VIII. were the first. Others go back to the Lollards or to the Martyrs in the early centuries. Others point to the Puritans under Elizabeth.

Mackintosh thought Sir H. Vane had obtained the earliest insight into the new light of toleration; others have pointed to Queen Elizabeth—1 *Buckle, Misc. W.* 88, 92; others to Owen—*Orme's Life of Owen*, 102; others to William III.—*Motley's Dutch Rep.* Cromwell and Milton seemed to concede toleration to all but papists.—*Whitelocke, Mem.* 499, 576, 614; 4 *Neal's Puritans*, 28, 138, 338; *Milton, Civ. Pow. Ecl. Caus.* Chillingworth was the great writer whose views were taken up and circulated by Hales, Owen, Jeremy Taylor, Burnet, Tillotson, Locke and Temple.—1 *Buckle, Civ.* 323. Even Locke and William III. and Lord Mansfield seemed to except Roman Catholics from the general rule of toleration, owing to their taint about the Papal supremacy and like doctrines. Hallam thought there had been no real toleration till the reign of George III.

three of them. Some special exemptions were allowed to Baptists and Quakers. And finally, a penalty was imposed on all disturbers of any congregation or assembly for religious worship. But no such congregation was to be permitted, unless it was certified to the bishop or Quarter Sessions and registered.¹ A place for religious worship under this Act was held to mean not a private house where family worship was held, but a place set apart for large numbers in a public manner.² As regards the bolting of doors, even after a century had elapsed, namely, when the laws of dissenting chapels were revised in 1812, it was still made punishable with a fine of 20*l.* for any person to preach with the doors bolted or barred so as to prevent persons entering.³ But at the same time it was decided by the courts, that the certificate of registration of a place of religious worship, or meeting-house, could be had for the asking, and enforced by *mandamus*, as the official had no discretion whatever to refuse it.⁴ This law, protecting dissenting chapels of every kind, has been carried out more systematically and comprehensively in later times. The enactment as to wilfully and maliciously, or contemptuously disquieting or disturbing any meeting, assembly, or congregation of persons assembled for religious worship, or the disturbing, molesting, or menacing any preacher, teacher, or person officiating, was extended to all meetings, assemblies, or congregations whatsoever of persons lawfully assembled for religious worship, and their preachers, teachers, or persons officiating.⁵ And though places regularly kept for religious worship must still be certified and registered with the bishop or archdeacon, or at Quarter

¹ 1 W. & M. st. 1 c. 18. "The Toleration Act is very imperfect. It is based on the theory that persecution is the general rule and toleration is the exception. The freedom was capricious. The Quaker had the full benefit of the Act; but not those who deny some of the articles. It removed a vast mass of evil without shocking a vast mass of prejudice. The English in 1689 were by no means disposed to admit the doctrine, that religious error ought to be left unpunished."—*Macaulay's Hist.* c. 11. Mrs. Barbauld seems entitled to the credit of saying, that toleration in worshipping God was the same thing as toleration in using our limbs.—*Mrs. Barb. Address*, 1790.

² 2 Atk. 499. ³ 52 Geo. III. c. 155, § 11. ⁴ *Green v Pope*, 1 L. Raym. 125; *R. v Derbyshire*, 1 W. Bl. 606; 4 Burr. 1991. ⁵ 9 & 10 Vic. c. 59, § 4.

Sessions, for which a payment of 2s. 6d. is the fee (no discretion being allowed to the officer to refuse such registration),¹ still if the place is only occasionally used for religious worship, or if the place is a private dwelling, or the premises belonging thereto, then no registration is needed and no penalty is incurred.²

Progress of legislative toleration after William III.—The crude Toleration Act of William III. was little more than a beginning of a recognition of the actual existence of such persons as dissenters and their liberty of worship in conventicles or chapels, while a vast area of intolerance as virulent as ever was left untouched, more especially that embraced in the Test and Corporation Acts, and what related to Roman Catholics. In dealing with all nonconformists a broad distinction was long kept up between Roman Catholic and the Protestant dissenters, the former being persecuted under a separate series of statutes much more severely than their fellow recusants.

One retrograde step occurred in 1719, when mayors, bailiffs, or magistrates were prohibited from attending a dissenting place of worship in their official robes, the penalty being the loss of their office.³ Another retrograde step taken, though apparently without any intention to aggrieve dissenters, was the statute of 1753, which, while reforming the marriage laws, made it compulsory for all persons, including dissenters, to enter into the marriage contract only by attending the parish church and according to the English Church service.⁴

The first statute of relief of any importance after the statute of 1688 was that of 1779, when it was declared in favour of those who scrupled to subscribe the Thirty-nine Articles, which all dissenting preachers and lecturers, and teachers of youth, were bound to do, that they might escape doing so by subscribing another oath set forth in that Act, which oath, among other things, required that the signatory was a "Christian and Protestant, and believed that the Scriptures contained the revealed will of God."⁵ Another still more important Act of 1812 wholly repealed the Conventicle and Five Mile Acts already mentioned.

¹ 52 Geo. III. c. 155. ² 18 & 19 Vic. c. 88. ³ 5 Geo. I. c. 4.
⁴ 26 Geo. II. c. 33. ⁵ 19 Geo. III. c. 44.

Still it was at the same time declared, that no religious assembly of Protestants exceeding twenty in number should meet without the place of meeting being first registered and certified with the bishop or Quarter Sessions, under a penalty of 20*l*.¹ But if so registered, then the dissenters and their clergy would escape all penalties mentioned in the Toleration Act of 1688.

Moreover, before the passing of either of these two last relief Acts a practice began, about 1729, for the legislature to pass indemnity Acts to protect those who had neglected to qualify for offices, and allowing further time so as to comply with the Acts. A regular series of these annual Acts began in 1745, having been occasional before that time,² and they continued to 1829. These indemnity Acts may be viewed as an unconscious homage to the advancing spirit of toleration.

The courts of law, after the Toleration Act, also cleared up some points left somewhat obscure by the numerous and confused statutes heaped one upon another relating to oaths and penalties. A great relief was declared to have been obtained by nonconformists by a decision of Holt, C.J., in 1704, when it was sustained as a valid excuse for not attending the parish church, as ordered by the statutes of Elizabeth, that the defendant regularly attended some other church of his own, even though he did not take the oaths of the Toleration Act.³ But a still more important advance was made by a decision of Lord Mansfield in 1767. The City of London at one time took advantage of the Corporation Act of 1661 to raise money by appointing dissenters to the office of sheriff and then fining them because they could not take the requisite oaths, and so could not serve the office.⁴ A bye-law of the Corporation made in 1748 had imposed a fine of 600*l*. on any "able and fit person" who, after being nominated, refused to serve. This being disputed by a dissenter named Evans

¹ 52 Geo. III. c. 155.

² 18 Geo. II. c. 11.

³ *Britain v Standish*, Cas. Holt, 141.

⁴ It was said, that these accumulated fines, exacted in the City of London from persons refusing to qualify for the office of sheriff, were spent in building the new Mansion House. In six years the fines amounted to 15,000*l*. The house was thence sometimes called the Palace of Intolerance.—18 *Parl. Deb.* (2) 1003.

as an illegal bye-law in a cause which had been taken by writ of error to the House of Lords, after three solemn arguments, Lord Mansfield laid down the law, that the Toleration Act rendered that which before was illegal now legal. That the dissenters' way of worship was permitted and allowed by that Act; that it was not only exempted from punishment but rendered innocent and lawful. That, in fact, it was *established*, and it was put under the protection, and was not merely under the connivance of the law. That therefore a dissenter, when prosecuted for the fine, was entitled to plead as a defence that he was a dissenter and had not taken the sacrament, and so was not "fit and able" to serve the office. And Lord Mansfield further observed that persecution, or attempts to force conscience, will never produce conviction, and are only calculated to make hypocrites or martyrs.¹ But the final repeal of the Test and Corporation Acts, after 160 years' experience, was accomplished in 1828; and there was then an end of excluding dissenters from reaching the offices to which these oaths and sacraments had been made conditions precedent, and which barred their entrance to those places of trust to which all honest citizens naturally aspire.² And finally, in 1846, every penalty whatsoever for recusancy, or non-attendance at church, or nonconformity, not already repealed, was wholly repealed thenceforth.³ And while the Universities of Oxford and Cambridge, and Durham, had been opened to dissenters [so far as taking degrees, in 1854 and 1855, this was carried further in 1871, so as to enable them to share in all the rights and privileges of graduates, and as to holding offices which other laymen may hold.⁴ And the

¹ Harrison v Evans, 16 Parl. Hist. 325; 3 Bro. P. C. 465.

And yet L. Mansfield, in another case thirteen years later, seemed to make an exception in regard to Roman Catholics. "Where the safety of the state is not concerned, my own opinion is, that men should not be punished for mere matter of conscience and barely worshipping God in their own way; but where, what is alleged as matter of conscience, is dangerous or prejudicial to the state, which is the case of Popery, the safety of the state is the supreme law, and an erroneous religion, so far as upon principles of sound policy that safety requires, ought to be restrained and prohibited."—R. v Lord G. Gordon, 21 St. Tr. 645.

² 9 Geo. IV. c. 17.

³ 9 & 10 Vic. c. 59.

⁴ 17 & 18 Vic.

c. 81; 18 & 19 Vic. c. 88; 34 & 35 Vic. c. 26.

advantages of public and endowed schools were equally extended to them in 1868 and 1869.¹

Progress of public opinion after Toleration Act.—From and after the period of the Revolution, from time to time champions of toleration arose, first among great writers, and at a later date in Parliament itself, who saw the futility of the Statutes of Intolerance. Locke, following Chillingworth, had urged that "All the life and power of religion consists in the inward persuasion of the mind; and it is impossible for the understanding to be compelled to the belief of anything by the force of the magistrate's power."² He also taught, that "every man has the care of his own eternal happiness, the attainment whereof can neither be facilitated by another man's industry, nor the loss of it turn to another man's prejudice, nor the hope of it be forced from him by any external violence."³ It is true that leading statesmen, a century later, adhered to the older opinions. Lord North, in 1790, still represented, as Blackstone himself had also done a little before that time, that the Test Act was the great bulwark of the Constitution; while Pitt urged, that to allow dissenters to hold office in the civil service or the army, or in corporations, was the same thing as to allow them to subvert the establishment of the country.⁴ On the other hand Beaufoy, at the same date, urged that the Test Act had "degraded the sacrament into a qualification for gauging beer-barrels and soap-tubs, and for seizing smuggled beer." And Locke himself had long before observed, that the sacrament was required to be taken as a qualification to get alehouse licences.⁵ Fox also urged that "Intolerance proceeded on the grand error, that one man could judge better of the religious opinions of another than that other himself could do; and all this was deduced merely from the supposed tendency and not from any actual conduct."⁶ He contended that "it was not in the power of man to surrender his opinion, and therefore the society which demanded him to make this sacrifice demanded an impossibility. What, then, did this lead to?

¹ 31 & 32 Vic. cc. 32, 118; 32 & 33 Vic. cc. 56, 58, and amending acts.

² Letters, Toler.

³ Ibid.

⁴ 28 Parl. Hist. 409.

⁵ 6 Locke's Wks. 372.

⁶ Fox, C.J., 28 Parl. Hist. 388, 1366: 29 Parl. Hist. 1376.

That no man shall be deprived of any part of his liberty with respect to his opinions, unless his actions derived from such opinions are clearly prejudicial to the state. In this country we were governed by King, Lords, and Commons. No man would contend that any of these powers was infallible. Then why should the members of the Established Church proceed as if they were infallible? for so they did, if they claimed exclusive privileges and enforced penalties on those who differed from them. An establishment was only to be maintained on the principle of its being agreeable to the opinion of the majority of the people, and not surely upon the slightest pretence of infallibility. To refuse to any man any civil right and an equal participation of civil advantages on account of his religious opinions was in itself persecution. What was the principle of persecution? The condemnation of a man before he had committed a breach of the law."¹ In 1812 Lord Grenville told his fellow peers, that it "is the inveterate habit of intolerance to impute to the followers of every rival sect opinions which they disclaim, and to deduce from these tenets conclusions which they utterly deny. Justice and charity, on the contrary, give to others the same liberty which we claim for ourselves—the liberty to form our opinions by the light of our own reason, to adopt, to investigate, to interpret for ourselves the tenets which we embrace, and to be credited in our exposition of them until our own practice shall have proved its insincerity."² Canning, in 1812, also said in the House of Commons, "I assume, as a general rule, that citizens of the same state, subjects living under the same government, are entitled, *primâ facie*, to equal political rights and privileges. And it is also desirable to create and to maintain the strictest union, the most perfect identity of interest and of feeling amongst all the members of the same community."³ And finally, in 1828, Lord J. Russell urged, that "the constitution of this country is intended to give to every man those rewards, that honour, that estimation, to which his character and talent entitle him."⁴

¹ 29 Parl. Hist. 1374. ² 22 Parl. Deb. 668. ³ 23 Parl. Deb. 635.

⁴ 95 Parl. Deb. (3) 1250. "The whole of the penal statutes against dissenters went upon one unfortunate and absurd mistake. Our ancestors, whom (I know not why) we are in the habit of calling

Dissenters' trust property and mode of preserving it.—Since the passing of the Toleration Act, charitable trusts for promoting the religious opinions of Protestant dissenters, such as maintaining chapels, schools, and ministers of a certain creed, have been held as valid as any other trusts.¹ And though it was once deemed illegal to devote property to the purpose of promoting doctrines contrary to the established religion, persons professing such doctrines might be the subjects of charitable bequests.²

When a chapel is erected with or without endowment, the mode of transmitting the property to the successive preachers and their congregations is by a deed vesting the legal estate in trustees with a power of renewing their number on vacancies caused by death, and upon trust to permit the preacher and congregation for the time being to have the use and enjoyment of it. When the trust is expressed to be in favour of any class of dissenters, the courts will support and carry out such trust. When the words and objects are very vague, as for example "the worship of God" or "for godly learning," it used to be held that the established form of religion will be preferred. And in like manner where the trustees of a religious charity were to be "honest persons of the parish" the court has held, that dissenters should not be elected.³ And yet, except it be to avoid uncertainty, it is difficult now to see, why this exclusiveness should any longer be acted on, since all religions, not involving a criminal offence or breach of the peace, are now equally established.

Mode of interpreting dissenters' trust deeds.—When the words of the trust are vague, inquiries into collateral

wise, had considered, that belief was an act of the will and not of the understanding. Upon that false assumption they had gone on adding penalty to penalty and statute to statute in the vain endeavour to control, by fear and by force, what was only to be effected by persuasion."—*L. J. Russell, H.C. 1828, 18 Parl. Deb. (2nd) 695.* "And who were the individuals exposed to these acts? The officers of the army and navy, commissioned and non-commissioned, the officers of the customs and excise, and all in the service of the chartered companies of whatever kind or description."—*Ibid.*

¹ *Att.-Gen. v Pearson*, 3 Meriv. 353.

² *Da Costa v De Pas*,

2 Swanst. 487 n.; *Strauss v Goldsmid*, 8 Sim. 614.

³ *Baker v*

Lee, 8 H. L. C. 495. In this case four law peers were equally divided.

matters are often necessary, in order to discover what class of dissenters was intended to be benefited. In these inquiries the instrument declaring the trust is always the first matter to be considered, and its interpretation. And if that is doubtful, then the usage of the congregation that has taken place under it is the best guide to the true meaning. In the case of Lady Hewley's charities, she had executed deeds in 1704 and 1707, soon after the Toleration Act, and she described the objects of the trust to be "godly preachers for the time being of Christ's Holy Gospel"; and she ordered none to be admitted, but such as were of "the Protestant religion and able to repeat the Lord's Prayer, the Creed, ten Commandments, and Bowles' Catechism." At those dates the Unitarian religion was not within the protection of the Toleration Act of 1688, though it was brought within it a century later, namely, in 1813. In course of time the Hewley charity estates became vested in trustees of whom the majority were Unitarians, and the rents were applied for the benefit of 237 chapels. Some thirty-eight of these had at first been Presbyterian congregations, but they afterwards became Unitarians, and these Unitarians were assisted for about seventy years. In a suit to displace the Unitarians, the House of Lords held, that neither Unitarians nor members of the Church of England but Protestant dissenters only were entitled to the benefit of those charities, and all the Unitarian members were accordingly removed from the office of trustees. That result was arrived at, not because Unitarians since 1813 were incapable of being objects of trust as much as any other religious body, but because the extensive evidence brought to bear on the construction of the Hewley deeds showed, that Lady Hewley was a member of a Trinitarian congregation, and the words she used were at the time commonly applied to denote the Presbyterians, Independents, and Baptists, all of whom were believers in the doctrine of the Trinity.¹ And thus it was, that the Unitarians were excluded. But owing to the hardship of interfering with so long a course of usage, a statute soon afterwards passed in 1844, which regulated in future the construction of these foundations.

¹ *Shore v Wilson*, 9 Cl. & F. 355.

It enacted, that all such deeds shall be construed as if the Toleration Acts from 1688 to 1807 had been in force at the founding of the meeting-houses, schools, and other charitable foundations in question. When no particular religious doctrines or opinions or modes of worship are mentioned expressly, or by reference in the original deeds, then the usage for the twenty-five years immediately preceding the suit is to be taken as conclusive evidence of the meaning, and as to the title to any meeting-house, burial-ground, Sunday or day-school, or minister's house. But whenever the deed or will states expressly or by reference the particular religious doctrines or opinions, then those are to be followed, notwithstanding any contrary usage.¹

Dissenting congregations and their pastors.—The minister of a meeting-house is only a tenant at will of the trustees, who can therefore at any moment terminate his tenancy by demand of possession, and even without notice. And he cannot claim to hold his office for life, even though no offence be proved.² Nevertheless care will be taken, that a minister is not removed without the rules of the religious body or congregation being complied with. If, for example, he cannot be removed legally, except by a decision of the congregation regularly convened at a meeting, the charges intended to be brought against him must be specified in the notice calling the meeting, and the minister himself must be apprised of the nature of the charges; and all the usual forms must be complied with, for this is only in accordance with the ordinary principles of justice.³ Yet when a majority of the congregation has in regular form passed a resolution for the removal of their pastor, it is the business of the courts of law to give effect to it, and prevent his officiating against their will.⁴ The court cannot assume, that a congregation so expressing their wish act capriciously; and there can be no remedy if they do so. In one case a minority of the trustees of a Baptist chapel called a meeting of the congregation, but not according to the ordinances of their society, and elected a pastor, and the court ordered

¹ 7 & 8 Vic. c. 45.

² Cooper v Gordon, L. R., 8 Eq. 249.

³ Dean v Bennett, L. R., 6 Ch. 489. ⁴ Cooper v Gordon, L. R., Eq. 249.

them to surrender the chapel to the rest of the trustees, who were to take the proper steps to re-elect a pastor in regular course.¹ Sometimes the rules of the religious body with which a congregation is connected throw light upon the regular course of proceeding in disputes about appointing a pastor. And whenever the deed of endowment neither provides for the succession of trustees nor the election of a minister, the court will find out a mode of supplying both these wants. Thus in the case of a congregation in London founded in 1769 calling themselves "the Presbytery of the Scotch Church in London" and conforming to the doctrine and practice of the Church of Scotland, the court said, that those persons, who, though seatholders, did not take the sacrament there, had no right to vote in the election of a minister, because the members who communicated according to the Scotch practice constituted the congregation on such occasions.²

Dissenting congregations changing their creed or mode of worship.—Courts of law will protect all dissenting congregations in the enforcement of their peculiar rules and practices, and treat them with the same respect as all voluntary societies are treated, which prefer to manage their own affairs in their own way. There is no authority in the court of law to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs, save only so far as it may be necessary, that they should do so for the due disposal or administration of property. If funds are settled, to be disposed of amongst members of a voluntary association according to their rules and regulations, then the court must necessarily take cognizance of these rules and regulations for the purpose of satisfying itself who is entitled to the funds. So if the rules of a religious association prescribe who shall occupy a house, or to have the use of a chapel or other building. On this principle, it is, that the courts have administered funds held in trust for all dissenting bodies. There is no direct power in the court to decide whether A or B holds a particular status according to the rules of a voluntary association. But if a fund held in trust has to be paid over to the person who,

¹ Perry v Shipway, 4 Dé G. & J. 353.
2 Russ. 114.

² Leslie v Birnie,

according to the rules of the society, fills that character, then the court must make itself master of the questions necessary to enable it to decide, whether A or B is the party so entitled. The only remedy which the member of a voluntary association has when he is dissatisfied with the proceedings of the body with which he is connected is to withdraw from it. If, connected with any office in a voluntary association, there is the right to the enjoyment of any pecuniary benefit, including under that term the right to the use of a house or land or a chapel or a school, then incidentally the court may have imposed on it the duty of inquiring as to the regularity of the proceedings affecting the status in the society of any individual member of it.¹ It is a general rule, that when the trust funds have been settled on a definite religious body, the congregation cannot divert the property into a different channel or apply them to a different sect without an Act of Parliament.² In a case in 1860 the trusts of a chapel were declared to be for the use of a congregation of Particular Baptists. The congregation became divided as to the doctrine of a strict and free communion. Since 1746 the congregation had acted on the doctrine of strict communion, but a majority in 1860 resolved to act on a free communion. The court held, that, whether the majority could make this change, depended on whether the doctrine was an essential and fundamental doctrine of that faith. According to the evidence it was proved not to be so; and therefore the court protected the majority in making the change desired by them.³ In another modern case trusts had been established in 1716 and 1803 for the benefit of "the congregation called Presbyterians" in Devizes. Long before that date some Baptists had associated themselves with that congregation, and since 1803 the members had been Baptists. In 1865 a congregation calling itself Presbyterian now claimed the property. But the court held, that the use of the term Presbyterian did not represent any particular religious doctrines or mode of worship; and therefore the Baptists having held the property for forty-five years were entitled to retain it.⁴

¹ *L. Cranworth, Forbes v Eden*, 2 Paters. Ap. 1450; L. R., 1 Sc. Ap. 568. ² *Att.-Gen. v Market Bosworth*, 35 Beav. 305. ³ *Att.-Gen. v Gould*, 28 Beav. 485. ⁴ *Att.-Gen. v Bunce*, L. R., 6 Eq. 563.

Hence in the case of a dissenting congregation being desirous to change its creed and mode of worship, it is not a question of a majority or a minority of the congregation so desiring it; but it is a question, whether their trust is specific enough to prevent it; and if so, then any one of the congregation can insist on preserving the original trust as it was. It is true that entire unanimity in a congregation may sometimes succeed; because then there would be no one having sufficient interest to interfere and set the law in motion against their acts.

Civil and religious freedom of dissenters and Churchmen.—It has been seen, that the Toleration Act of 1688 first recognised attendance at dissenting chapels as a valid excuse for escaping the penalties incurred by not attending the parish church. This relieved the Protestant dissenters to a considerable extent, and allowed them to meet in conventicles, provided they took certain oaths and held their religious meeting with open doors. In 1779 dissenting ministers were allowed, on taking an oath that they were Christians and Protestants, freely to teach youth. And in 1812 the Conventicle Act and Five Mile Act were repealed; and this left them to hold conventicles without restriction, provided these were registered with the bishop. And finally in 1829 the Test and Corporation Acts were repealed, which prevented dissenters filling offices in the army and navy and magistracy and in corporations. In 1846 every kind of penalty for not conforming to the Church was repealed.¹ Lastly, in 1871 they were allowed to enter the Universities of Oxford and Cambridge and take their degrees and enjoy the privileges thereto attaching.² And in 1867 those dissenters who were magistrates were allowed to enter their own chapels in their official robes of office.³ And in 1836 they were no longer bound to go to the parish church, to be married according to the forms of the Church of England.⁴ The result is, that Protestant dissenters enjoy all the liberty and have the same advantage in filling all the offices of social and political life as freely as Churchmen. Whatever property they choose to dedicate for worship or education, they can do therein as they think fit; the law has

¹ 9 & 10 Vic. c. 59. ² 34 & 35 Vic. c. 26. ³ 30 & 31 Vic. c. 75, § 4. ⁴ 6 & 7 Will. IV. c. 85.

nothing to say to the object, the manner, or the machinery, unless and until they quarrel about their rights amongst themselves. They in fact manage entirely their own affairs in their own way, having only the same kind of protection from the law, as other persons have according to their respective employments and acquisitions. The dissenting clergy, while enjoying liberty to conduct their public worship according to their own forms, whether these are adopted by each separate congregation, or by synods of many congregations, are bound only by mutual contract to adhere to certain rules of doctrine and discipline. All the restrictions they are subject to are of their own adoption and choice. On the other hand, the clergy of the Church of England are bound down by rigid statutes in all that they do—in the enjoyment of their property, their maintenance, their rites and ceremonies, their vestments and the doctrine they shall profess and teach, so that no deviation from the standard appointed for them can be allowed. And so multiplied and minute are these restrictions, that they occupy a large space and fill many chapters in the laws of the land, and the enforcement of these laws requires frequent aid from the courts, and a large variety of officers and assistants, as has already been set forth. But the substantial right which Churchmen and dissenters now enjoy is one and the same, that is to say, each can in peace and security join in that form of worship which he considers best, and incurs no liability or risk, and loses no worldly advantage, and is subject to no drawback in doing so. They have both arrived, so to speak, at the same goal, neither being allowed to interfere with the other, or make each other any longer afraid. The only restriction on dissenters is the trifling homage they pay to order, by registering their chapels and holding their services with open doors. In all other respects they may be said to be as free in the exercise of their public worship as any member of the community in the exercise of his trade or profession.

Quakers and Unitarians as dissenters.—The Quakers were the first of the dissenters to express a decided antipathy to church rates and tithes. They are said to have assumed the offensive, and to have gone to churches to assail the preachers and excite disturbances. During the

Protectorate 3,173 of them were imprisoned, whipped, and pilloried for these offences.¹ In the time of Charles II. they were punished with imprisonment and transportation, if they refused to take a judicial oath.² But two Acts of William III. allowed them to make an affirmation instead of such oath, also to serve compulsory offices by deputy.³ A bill to relieve them in some particulars as to oaths and as to the mode of paying tithes was opposed in vain by the London clergy as endangering the maintenance of the clergy by tithes, "and as dispensing with oaths, which God himself instituted as the surest bond of fidelity among men."⁴ They were soon also allowed to make declarations of fidelity in lieu of oaths of supremacy and allegiance.⁵ The proceedings as to tithes were varied as regards them, as stated in a previous chapter.⁶ They were allowed to find substitutes to serve in the militia and kindred acts.⁷ And the Marriage Act of 1753 did not interfere with their customs of marriage, though it did not spare most other dissenters.⁸ And even the Acts of 1836 with amendments left their marriages alone, provided only that due notice is given to the superintendent registrar of the district; and the marriages may take place in their own meeting-houses.⁹ And when a Quaker was elected a member of Parliament in 1833, he was found entitled on making his solemn affirmation to enter and take his seat.¹⁰ In all other respects the Quakers are on the same footing, so far as their religion is concerned, as other dissenters.

Unitarians were in 1813 relieved from the punishment assigned to blasphemy against the Trinity by the statute William III.¹¹ And in other respects they do not differ from other dissenters. Their grievances in relation to Lady Hewley's charities led to an amendment in the laws, as already stated, which was at the same time communicated to all other dissenters.

Roman Catholics as dissenters.—It is necessary to notice one class of dissenters at greater length. Roman

¹ Skeat's Hist. 70.

² 13 & 14 Ch. II. c. 1; 16 Ch. II. c. 4.

³ 7 & 8 Will. III. c. 34. ⁴ 7 Parl. Hist. 942. That bill passed the House of Lords by 52 to 21. ⁵ 8 Geo. I. st. 2, c. 6. ⁶ See *ante*, p. 467. ⁷ 42 Geo. III. c. 90, § 50. ⁸ 26 Geo. II. c. 33, § 18.

⁹ 6 & 7 Will. IV. c. 85, § 2; 35 Vic. c. 10 ¹⁰ H. C. 14 Feb. 1833.

¹¹ See *ante*, p. 64.

Catholics were included among those who did not conform to the Church of England, by absenting themselves, and not taking oaths when these were necessary; and a distinct series of statutes, from the time of Edward VI., have dealt with them, so that they for centuries stood by themselves, singled out from all other dissenters by the severity and long continuance of the penalties, disabilities, actions, and indictments, which were aimed at them. And their case was an excellent example of the slow degrees by which they ultimately have obtained a toleration almost identical with other dissenters. And for that reason, if for no other, the lessons to be deduced from their history are of permanent use, and very fit to be remembered. The reason of this severity was the supposed inveterate attachment of Roman Catholics to the Pope, and their allegiance being supposed to be given first to him. It was high treason to pretend to absolve any within the realm from their natural obedience, or to move them to obey the see of Rome, or even to be reconciled to that communion.¹ And that law continued till 1791,² and in some points till 1846.³ Hence Popery used to be spoken of in courts as a standing conspiracy against the state as well as religion.⁴ Papists were deemed, almost by a rule of law, to be constantly engaged in dissuading people from their natural allegiance. Coke said, that Papists were lepers of the soul, and that it was the practice of the courts not to accept Popish recusants as witnesses or sureties. And he told a group of such persons it was far safer for them to lie in prison than to be at large and not to conform themselves.⁵ And this condition debarred them from practising any of the leading professions.⁶

¹ 23 Eliz. c. 1; 3 Jas. I. c. 4. ² 31 Geo. III. c. 32. ³ 9 & 10 Vic. c. 59. ⁴ *Thornby v Fleetwood*, 10 Mod. 117. ⁵ *Att.-Gen. v Griffith*, 2 Bulst. 155.

⁶ 3 Jas. I. c. 5, § 5. BURKE said that in his time "no man thought of any danger from the machinations of the Pope. Why then should a danger be pretended, which did not exist, and pretended merely for the sake of persecution? Why should we heap oath upon oath, as if we wished at all events to pick a quarrel with our Roman Catholic brethren? Did not this look like the effects of that green-eyed monster 'jealousy,' whose suspicions it was utterly impossible to remove? The Pope, politically speaking, was as dead as the Pretender, and as dead as Pope Julius Cæsar."—28 *Parl. Deb.* 1371.

Popish recusants refusing to attend church.—A series of statutes, as already mentioned, from Edward VI. to William III. punished all persons who, from any cause of a religious nature, refused to attend the parish church. Till the statute of 35 Elizabeth, c. 2, all persons refusing to attend church were called recusants; but a distinction was then made between Protestant and Popish recusants. The former were practically relieved from all these penalties by the Toleration Act of 1 William and Mary. It was otherwise with Papists. A Popish recusant when once convicted was called a Popish recusant convict, who was liable to a fine of 20*l.* per month. He could not hold any offices or employments; he could not keep arms in his house; he could not sue in courts of law; he could not travel five miles from home, unless by licence, under a penalty of forfeiting all his goods. A married woman when a recusant convict forfeited two-thirds of her dower: she could not be executor or administrator to her husband, and during her marriage might be kept in prison for life, unless and until the husband paid for her 10*l.* per month, or gave up a third part of her lands. Besides the general offence of Popish recusancy, the recusant convict also incurred a fine for not marrying according to the rites of the Church of England, and the wife was deprived of her dower.¹ So there was a fine for not having his children baptized in the Church of England.² And even when he died, his executor was harassed by another fine for not burying the corpse in a Church of England grave.³ Nor was the recusant convict allowed to come to the court of the sovereign or sit in either House of Parliament, under a penalty of 500*l.*; or to come within ten miles of London unless it was his only dwelling, under a penalty of 100*l.*; and any two justices, or the mayor and his bailiffs, could at discretion search for, seize, and burn, all his pictures, beads, altars, and reliques.⁴ A Popish recusant convict had to abjure the realm in three months after conviction; and if he did not depart, or if he returned without leave, he was declared a felon without benefit of clergy.⁵

Romish priests and teachers.—The open exercise of

¹ 3 Jas. I. c. 5. ² Ibid. § 14. ³ Ibid. § 15. ⁴ Ibid.

⁵ The rich Catholics were said to compound with Queen Elizabeth for the penalties.—4 *Stirype*, 197.

the Roman Catholic religion was punished also severely. If any English Romish priest came from abroad, and did not conform to the English Church in three days, he was guilty of high treason. Any schoolmaster educating Roman Catholic children was fined, for not conforming, a sum of forty shillings a day; and the parents were fined 10*l.* a month. If the parents sent the children abroad to be educated they forfeited 100*l.*; and the children could not inherit, or purchase, or enjoy, lands or legacies. And to say mass was punishable by a fine of 200 marks, and to hear it by a fine of 100 marks.¹ So late as 1700 a Popish bishop or priest celebrating mass within the realm was punishable with perpetual imprisonment.² It was at first also made a penal offence for Roman Catholics to teach youth without a licence from the bishop or ordinary.³ The punishment seemed to be aimed chiefly at public teachers or those employed in noblemen's or gentlemen's families.⁴ But soon even private teachers required to get a licence from the bishop.⁵ And perpetual imprisonment came to be the punishment for neglect.⁶ By the second Relief Act of 1791, it was still the law, that no Roman Catholic could keep a school, or receive the child of a Protestant father into his school, unless its description was registered at the quarter sessions; and this last restriction was only repealed in 1832 and 1846.⁷ And by the Act of 1829, the Roman Catholic archbishops and bishops were prohibited by a penalty from using the same ecclesiastical titles for the same province and bishopric as in England and Ireland.⁸

Gifts for purposes connected with Roman Catholic services were first made void by the statutes of Henry VIII. and Edward VI.⁹ The later Act treated as gifts to superstitious uses any gifts for the benefit of the souls of the dead, as by masses, or the perpetual maintenance of lamps or candles in churches or chapels, and vested the property in

¹ 1 Eliz. c. 2, and statutes down to 1 Geo. I. c. 13. ² 11 & 12 Will. III. c. 4, § 3. ³ 23 Eliz. c. 1. ⁴ 1 Jas. I. c. 4.

⁵ 13 & 14 Ch. II. c. 4, § 11. ⁶ 11 & 12 Will. III. c. 4.

⁷ 31 Geo. III. c. 32, § 16; 2 & 3 Will. IV. c. 115; 9 & 10 Vic. c. 59. ⁸ 10 Geo. IV. c. 7, § 24. In 1851 another Act was passed, 14 & 15 Vic. c. 60, but was repealed in 1871, 34 & 35 Vic. c. 63.

⁹ 23 Hen. VIII. c. 10; 1 Ed. VI. c. 14.

the king. But in 1860 a statute enacted, that no existing or future gift of real or personal estate for any lawful charitable trust for the exclusive benefit of persons professing the Roman Catholic religion should be invalidated, merely because the same estate is also subjected to trusts for superstitious uses, and the court is to separate the lawful from the unlawful purpose.¹ And various rules are laid down in the same statute tending to protect these gifts, thereby placing them on the same footing as in case of other dissenters.

Oaths required from Roman Catholics.—One great engine of persecution against all dissenting sects was the exacting of oaths, and punishing those who could not or would not take them. The Gunpowder Plot suggested the necessity of oaths of allegiance.² The Roman Catholics seemed not to object to take the oath of allegiance,³ or the oath of abjuration.⁴ But the oath of supremacy which varied in form under Elizabeth and James, and William III., was what could not be got over. The substance of it was, that no foreign prince had any power or authority, ecclesiastical or spiritual, within the realm. This oath could be tendered at any time by two justices of the peace without any preliminary notice or summons; and refusal made the party a popish recusant convict, and as such liable to all the punishments and disabilities of that state. The refusal of that oath prevented the party from exercising any of the legal professions or voting at elections. The refusal to take the sacrament under the Corporation Act, 13 Charles II., prevented the Roman Catholics holding any offices in corporations. And under the Test Act of 25 Charles II. c. 2, they were precluded from holding any office civil or military under the Crown. The oath against transubstantiation, and against the invocation of saints, and against the mass, imposed by 30 Charles II. st. 2, c. 1, kept the Roman Catholics from sitting in either Houses of Parliament for 150 years, until they were restored in 1829 by the Catholic Emancipation Act.⁵

Roman Catholics holding property.—The consequences of inability to take oaths affected also the holding of

¹ 23 & 24 Vic. c. 134.

² 7 Collier, Eccl. Hist. 345, ed. 1846

³ 1 Geo. I. st. 2, c. 13.

⁴ 6 Geo. III. c. 53.

⁵ 10 Geo. IV.

c. 7, § 2.

property. Even so late as 1700, a person educated in or professing the Popish religion, who did not, in six months after he was eighteen years of age, take the oaths of allegiance, supremacy, and transubstantiation, ceased to be entitled to any lands, estates, or interests in land. He was incapable of devising, or inheriting, or purchasing, or enjoying; and his next of kin, if a Protestant, could enter into possession and enjoy without rendering any account.¹ Moreover, Catholics could not, and still cannot exercise the right of nomination to a benefice in the Church of England if they have advowsons; and they paid double land-tax. By a statute of 1 George I. c. 13, they were bound under a penalty to register their names and estates; and by a statute of 3 George I. c. 18, they must enrol all their deeds and wills, otherwise these would be void. It was not till 1829 that the capacity to hold and acquire real property was restored to Popish subjects; and they were then put on the same footing as other subjects,² and the same has still later been made the rule as to their education and charities.³

Relief to Roman Catholics by degrees.—Penalties upon penalties fell upon the Roman Catholics from the time of Edward VI. to the time of George I., without a sign of abatement or deduction. The Toleration Act of 1 William and Mary was for Protestant dissenters only. An Act of 1716 partially prevented sales by Papists of their real estate from being questioned; and this was a first contribution of relief.⁴ In 1778 a new form of oath was made for Roman Catholics, which omitted allusion to the Pope's spiritual jurisdiction, or only stated, that the Pope of Rome had no *temporal* or civil jurisdiction within the realm; and on taking this oath they were allowed to inherit or purchase lands, and send their children to school, and to say and hear mass without a penalty.⁵ In 1791 another oath was made for Roman Catholics, slightly varying the terms once more, and adding in plain words, that the deponent professed the Roman Catholic religion; and on taking this oath he was no longer punishable for not attending the parish church; he might attend his own place of worship, and if the doors were not locked and

¹ 11 & 12 Will. III. c. 4.

² 10 Geo. IV. c. 7.

³ 2 & 3 Will. IV. c. 115.

⁴ 3 Geo. I. c. 18.

⁵ 18 Geo. III. c. 60.

the chapel had no steeple or bell, he need not after that date take the oath against transubstantiation, and incurred no penalty for coming to court; he need no longer register his deeds and wills, and might practise as a barrister or solicitor without taking the oath of supremacy or the oath against transubstantiation.¹ The places of worship used by Roman Catholics required, by a statute of 1791, to be certified to the quarter sessions or to the bishop; and the names of the priests also must have been recorded at quarter sessions.² But at last, in 1832, Roman Catholics were made subject to the same laws as the Protestant dissenters, in respect to their schools and places for religious worship, education, and charitable purposes.³ This registration of places of worship is still the law, and any person suffering an unregistered assembly in his house as well as the officiating preacher or teacher incurred large penalties.⁴ And by the Act of 1791 the molesting of Roman Catholic congregations was punished as in the case of churches and dissenting chapels.⁵ By another Act of 1817, Roman Catholics might enter the army or navy as officers without taking the oaths and declarations required under former Acts.⁶ These Acts, coupled with the repeal of the Test and Corporation Acts in 1828,⁷ and the Catholic Emancipation Act of 1829,⁸ and the Religious Disabilities Repeal Act in 1846,⁹ put the Roman Catholics, substantially on the same footing as Protestant dissenters. The chapel must still be registered, as was enacted in 1791. And though the enactment of 1791 which forbade a steeple and bell to be used to their chapels, has never been expressly repealed, it was impliedly repealed in 1832.¹⁰ Notwithstanding the emancipation of Catholics in 1829 from the long chain of penal and disabling statutes, they were still expressly required by oath to repudiate certain doctrines supposed to be part of their religion, as to the right of murdering princes, or the Pope's civil jurisdiction in the United Kingdom, and the right to subvert the present Church establishment, and the right to disturb or weaken

¹ 31 Geo. III. c. 32. ² Ibid. § 5. ³ 52 Geo. III. c. 155, § 2; 2 & 3 Will. IV. c. 115, § 1. ⁴ 52 Geo. III. c. 155, §§ 2, 11.
⁵ 31 Geo. III. c. 32; 9 & 10 Vic. c. 59. ⁶ 57 Geo. III. c. 92.
⁷ 9 Geo. IV. c. 17. ⁸ 10 Geo. IV. c. 7. ⁹ 9 & 10 Vic. c. 59.
¹⁰ 2 & 3 Will. IV. c. 115, § 1.

the Protestant religion.¹ But this oath has in turn been repealed, and nothing but an oath of allegiance is left. The statute of 1829 expressly enacted, that Roman Catholics might vote at elections.² And a mayor or corporate officer was liable to a penalty if he attended in his official robe any other place of worship than an established church.³ But that also was repealed in 1867.⁴ The facilities for marriage of Roman Catholics do not now materially differ from those of other religious bodies. Any Roman Catholic place of worship can be registered for the purpose of solemnizing marriages.⁵ And if the registrar attend, the ceremony may be conducted according to the rites of the Catholic Church.⁶ The disabilities of Catholics extended far and wide, and struck at all classes. The sovereign must neither profess the Popish religion nor marry a Papist.⁷ And the regent is restricted in like manner.⁸ Nor can a Roman Catholic hold the office of Lord Lieutenant of Ireland or Lord Chancellor of Great Britain, or High Commissioner to the General Assembly of the Church of Scotland.⁹ In 1829 Roman Catholics were admitted to civil and military offices under the Crown, on taking the oath appointed by that Act,¹⁰ and now without the oath.¹¹ As the clergy of the Church of England are expressly disqualified from becoming members of the House of Commons, so are Roman Catholic priests, whether priests before or after their election.¹² In this particular they are subject to a restriction which has no place with Protestant dissenters. And in like manner Romish priests are disqualified from being councillors or aldermen in municipal corporations.¹³ On the other hand, they share with the clergy of the Church of England and dissenting ministers the exemption from serving as jurymen and as churchwardens and parochial officers.¹⁴

Jesuits. — Jesuits and seminary and other priests,

¹ 10 Geo. IV. c. 7. ² Ibid. c. 7, § 5. ³ 5 Geo. I. c. 4; 10 Geo. IV. c. 7, § 25. ⁴ 30 & 31 Vic. c. 75, § 4.

⁵ 6 & 7 Will. IV. c. 85, § 18; 7 Will. IV. c. 22, § 35.

⁶ 7 Will. IV. c. 22. ⁷ 12 & 13 Will. III. c. 2, § 2; 31 Geo. III. c. 32, § 12. ⁸ 10 Geo. IV. c. 7, § 12.

⁹ 10 Geo. IV. c. 7 § 12. A Roman Catholic was allowed to be Lord Chancellor of Ireland after 1867.—30 & 31 Vic. c. 75, § 1.

¹⁰ 10 Geo. IV. c. 7, § 10. ¹¹ 34 & 35 Vic. c. 48. ¹² 10 Geo. IV. c. 7, § 9; 41 Geo. III. c. 63. See *ante*, p. 481. ¹³ 5 & 6 Will. IV. c. 76, § 28. ¹⁴ 31 Geo. III. c. 32, § 8.

professed by authority derived from the see of Rome, were forbidden to enter the realm, except licenced by the bishop and two county justices.¹ It was also forbidden to send relief out of the realm to Jesuits or priests who had been born within the realm.² And what was meant was made more clear by imposing a heavy penalty, also a disability to inherit or hold property, on all who sent their children or wards to be educated in a foreign Popish college or seminary.³ And with a view to intercept this baneful tendency, neither woman nor child under twenty-one was to be allowed by means of vessels to pass the seas without a licence of the sovereign and of six privy councillors.⁴ And all the parties concerned were punished; the child especially forfeiting all his property, the next of kin meanwhile succeeding and possessing it till the child complied with the law.⁵ And with like views, those sending children abroad to Popish colleges and seminaries, or sending money to maintain them there in learning involved forfeiture of property and other disabilities.⁶ On the other hand, if the child of Popish parents who was refused a proper maintenance became disinclined to embrace the Popish religion, and chose to complain to the lord chancellor, the latter could order a maintenance.⁷ The relief given in 1791 did not extend to legalising the foundations or endowments of existing or future religious orders bound by monastic or religious vows; and all trusts of real or personal property were treated as void whether express or by way of secret trust.⁸ A Jesuit or male regular, if resident in the United Kingdom, was expressly required by the Act of 1829 to register his place of residence, name, and age, and the name of his immediate religious superior in the order, with the clerk of the peace.⁹ And even when they were natural born subjects, if they had been abroad before 1829, and had afterwards returned to the realm, the same restriction was imposed on them. And for a limited time the secretary of state could give a licence to other Jesuits to come into the realm.¹⁰ To be a Jesuit, except

¹ 27 Eliz. c. 2. ² Ibid. § 6. ³ 1 Jas. I. c. 4; 11 & 12 Will. III. c. 4, § 6. ⁴ Ibid. ⁵ 3 Jas. I. c. 5, § 16. ⁶ 3 Ch. I. c. 2.
⁷ 11 & 12 Will. III. c. 4, § 7. ⁸ 31 Geo. III. c. 32, § 17.
⁹ 10 Geo. IV. c. 7, § 28; 2 & 3 Will. IV. c. 115, § 4.
¹⁰ 10 Geo. IV. c. 7.

under the restrictions mentioned, and to be found in the realm, or even to become a Jesuit after 1829 in the realm was to be guilty of a misdemeanour, and in some of the cases liable to banishment for life.¹ And if the banished Jesuit would not depart, the Crown in privy council might direct him to be conveyed to any place beyond the realm.²

The above form all the main peculiarities which distinguished, and still in some instances distinguish, Roman Catholics from other dissenters.

Jews and their religion.—One other class of non-conformists stands out from all the rest, distinguished by many peculiarities, especially in their ancient treatment. The literature of early Christians shows a singular want of charity towards the Jews, and the canons of Egbricht, Archbishop of York, in the eighth century, forbade Christians even to eat with them.³ By some unaccountable reasoning, it came to be a current maxim in the time of Edward the Confessor, that the Jews, with all their possessions, belonged to the king, as his villeins or bond slaves.⁴ William the Conqueror is said to have encouraged that people to come to England, and John treated them treacherously. The wealth which some of them, notwithstanding much loss from extortion, had already accumulated about the time when the Crusaders went forth to fight the Saracens, excited envy, and the needy enthusiasts of that time thought it no robbery or murder to despoil of both lives and goods the descendants of the original wrongdoers in that quarrel.⁵ The people, seeing the Jews so treated, began to think they had authority to ill-treat and to pillage and murder them also. Even ordinances were passed, that no Christian should nurse the child of a Jew, or eat with them, or live in the same house, or marry with them; and on failure to obey these edicts their goods were to be confiscated.⁶ In the reign of Edward I. a statute passed with the view of

¹ 10 Geo. IV. c. 7, §§ 29, 31, 32. ² Ibid. § 35. ³ A.D. 750, 1 Wilk. Conc. 11. ⁴ Spelm. Conc. 623.

⁵ Chron. Walt. Hem. c. 43. One thousand five hundred Jews were massacred at York in these senseless outbursts of long smouldering antipathy in the time of Richard I.—*Walt. Hem.* c. 44.

⁶ Claus. Rot., 37 Hen. VIII. m. 18; Maddox, Exch. 155. 169.

checking the practice of usury, and by which the old severities were kept alive.¹ The same people were also directed, by force if necessary, to attend lectures delivered with the intention of converting them.² The advantage of conversion was, that when the Jew became a Christian the king was deemed entitled to seize and confiscate the whole estate; but after a time it was provided that the convert may keep half of the estate. Another peculiarity attending the law of the Jews was as to their marriages. They were excepted from the restrictions of the English Marriage Act of 1753, and continued to be married according to rules of their own, these marriages being deemed valid and treated on the same footing as foreign marriages. In 1836, when the marriage laws were revised, Jewish marriages were allowed to be continued according to their own usages, provided only both parties were of the Jewish religion, and provided notice to the superintendent registrar was given.³

Early expulsion of the Jews from England.—A clamour anciently arose, that all the Jews should be expelled; and Edward I. acquired popularity by issuing a proclamation and afterwards a decree to that effect in 1290.⁴ And this was acted on, so that it was estimated about 16,000 left the country at that date. It is related that they did not return for 360 years, till Oliver Cromwell was asked to secure liberty of conscience to them. Opinions were then divided both among the civilians and the clergy, and after consulting all the wise men of the day, the Protector came to no definite conclusion.⁵ But soon after the Restoration a few Jews came into England without observation, and settled there, and though the House of Commons in 1670 made some inquiry

¹ 18 Ed. I. m. 6, Rot. Cl.

² Rot. Pat. 8 Ed. I. m. 37.

³ 6 & 7 W. H. c. 85, § 2; 3 & 4 Vic. c. 72; 19 & 20 Vic. c. 119, § 22. It was felony for a Christian to marry a Jew, and the offending party was ordered to be burnt, the only reason given by Coke being, that Jews were infidels and infidels were aliens, and aliens could be prohibited by the king from trading or entering into contracts with the subject.—2 *Inst.* 509; 3 *Inst.* 89; *Fleta*, B. I. c. 35. Coke's notion that Jews were indelibly aliens was mostly dispelled by a judgment of Lord Hardwicke & Willes, C. J.—*Omychund v Barker*, *Willes*, 540; 1 *Atk.* 21.

⁴ Ann. Wav. 242.

⁵ Blunt's Hist. Jews, 70.

into their numbers, it took no definite step to interfere with them.

Contracts and property of the Jews.—At the time of the Conquest and before it, the Jews, as already mentioned, were treated as the king's villeins or bond slaves. But this was merely a convenient theory to justify an arbitrary confiscation of their property, when the king felt the need of money. Richard I. ordered a register to be kept of their lands, houses, mortgages, and possessions; and the Crown even went the length of constituting a special branch of the Court of Exchequer to facilitate the execution of these tyrannical edicts. This was called the Exchequer of the Jews, having its own justices, who executed the king's writs, and supervised most of the transactions of that people.¹ The kind of law these justices administered was different from the common law, being varied by customs which were then supposed to be grateful to the people dealt with; and the jurisdiction by degrees absorbed nearly every kind of business. And many idle and frivolous distinctions were laid down in royal charters, and practised by these nondescript judges as to the kind of evidence admissible in certain contracts and in certain phases of litigation between Jews and Christians. But as the fundamental idea was, that Jews were slaves, the superstructure of folly raised thereon can only interest antiquarians. It was only in accordance with these early prejudices, that there should be restrictions on the liberty of Jews acquiring and holding lands in England; though Bracton, indeed, as if removing a misconception current in his day, takes care to say, that there was nothing then to restrain them.² The ordinance or statute of Henry III. was long thought expressly to restrict Jews from holding freehold estate in lands, or from acquiring more land in the city of London.³ And another statute of Edward II. prohibited them from alienating their lands without a special licence of the king, though they might buy the houses they lived in, in cities and boroughs.⁴ They were prohibited from usurious contracts or from taking more than a moiety of the lands or goods of Christians for their debt. Their right to purchase land long was treated as a moot question, and divided lawyers in

¹ Madd. Hist. Exch. ² Bract. b. ii. c. 5, § 6. ³ 55 Hen. III.

⁴ Stat. de Judaismo, 17 Ed. II.

1753, and long afterwards.¹ And the Test and Corporation Acts and other statutes of intolerance kept them out of all public offices. And when the Toleration Act began to recognise Protestant dissenters in 1688, it was doubted whether it protected Jews; and even when Roman Catholics were so largely and conspicuously relieved in 1829, the disabilities of the Jews were still left out of view.²

Civil and religious liberty of Jews.—The time at last arrived when intolerance yielded to the call of reason and justice. In 1839 Jews were admitted to hold offices in corporations.³ In 1846 they were put on the same footing as Protestant dissenters in respect to their schools, places for religious worship, education, and charitable purposes, and the property held therewith.⁴ After the House of Commons had passed a bill nine times to admit the Jews as members, and after that House was about to proceed by way of resolution to modify its oath, the House of Lords withdrew all further opposition, and a statute authorised their admission into either House of Parliament in 1858.⁵ They shared the entire advantages of admission to the Universities of Oxford and Cambridge in 1871. And in that year the very highest offices in the kingdom were thrown open to them.⁶

It may thus be said that, except in one or two particulars relating to Roman Catholics, and in the matter of the burial of dissenters in parish churchyards, religion is

¹ 14 Parl. Hist. 1368. ROMILLY thought they could not hold lands.—25 *Parl. Deb.* (2) 429.

² At the passing of the repeal of an Act allowing Jews to be naturalised a peer proposed, that the House should consult the judges, in the time of Holt, C. J., whether a Jew could, under the then existing law, hold land in England; but the judges were not consulted, as they were thought not to be bound to answer questions except upon a pending bill. The opinions of the profession of that day seemed to be against any then existing restriction on Jews acquiring land. The latest Naturalisation Act declares that all aliens now may hold real estate the same as natural born British subjects.—33 & 34 Vic. c. 14. A wealthy Jew having disinherited his daughter for becoming a convert to the Christian religion, a statute was passed to enable the Lord Chancellor in these cases to order a maintenance to be settled on such children in future.—1 Anne c. 30; this was repealed in 1846.

³ 8 & 9 Vic. c. 52. ⁴ 9 & 10 Vic. c. 59, § 2; 18 & 19 Vic. c. 88.

⁵ 151 Parl. Deb. (3) 1371; 154 *ibid.* 14; 21 & 22 Vic. cc. 48, 49; 23 & 24 Vic. c. 63. ⁶ 34 & 35 Vic. c. 48.

no longer a ground of disability or disadvantage of any kind to any citizen ; and all modes of public worship are protected with impartial hand by the law.

Street preaching.—We have now seen, that the progress of toleration begun in 1688, and marching on against frequent impediments ever since, and not yet quite ended, has practically put all religions and modes of worship on one level, and under the impartial protection of the same law. It is true, all these modes of faith, whether embodied in an elaborate ritual or simpler forms—in the cathedral or parish church, the Roman Catholic chapel, the synagogue, the meeting-house, the conventicle, are such as are practised by large congregations in fixed places of worship. There is still a more primitive and simpler form of public worship than any of those, which requires a few last words of notice. This is that mode of worship conducted by street preachers, who have no fixed abode, and no regular flock, but who go out into the hedges and ditches, stand in fields and alleys and at street corners, wherever two or three can be brought together as a beginning of an audience often fit though few—who pursue a self-imposed vocation unconsecrated, unlicensed, unbeneficed, unpaid—without retinue, without oblations, and without hope of reward—crying in the wilderness, and fed by the ravens. Though these men were once justly feared by Governments, and played great parts in the silent revolutions of opinion, and in the resolute protests against former tyranny and intolerance, they also now share like the regular army of priests and pastors in the comprehensive freedom of speech and thought established, and within the reach of all alike. The Conventicle Act of Charles II. put heavy penalties on those who preached in fields and at corners without a licence and a ritual, but that Act was, as already stated, repealed after 150 years' experience, in 1812 ; and there has been no practical restriction on street preaching since the latter date. It is true that inasmuch as these preachers are often in the eye of the law trespassers on land, they may occasionally be subject to an action at law, when they without permission exercise their gifts in places which are not highways, and over which the freeholder has, or may resume means of possession. And when they collect crowds on highways in such positions and times as to create a

sensible obstruction to those who are using the highway, they are liable to be summoned under the Highway and Turnpike Acts, for the obstruction so caused, as was noticed on an earlier page, as to the holding of public meetings.¹ But though they may, when so summoned, be fined a small sum, yet, as a general rule they cannot be arrested summarily by constables or other persons, as is too often attempted or threatened, unless some local act in force at the place in question expressly authorizes this to be done. And courts and magistrates can judge of the very temporary character of the obstruction, if any, which is usually caused, and can estimate how seldom that is substantial or worthy of reprehension; and they have it in their discretion to discourage frivolous interferences with an employment which can seldom do harm, and often is of striking advantage to such casual audiences as can be collected. And this treatment is that which is most becoming in a country, whose institutions are stable enough to withstand all the random shocks which can be caused by free voices from the crowd on any subject whatever.

¹ See *ante*, p. 22.

INDEX.

- ABANDONING** copyright, 261 ;
 patent, 336.
Abinger, L., on reputation, 7 ;
 on physical force demonstrations,
 85.
Abridgement, as infringing copy-
 right, 292 ; action for, 296.
Acting a novel, if an infringement,
 294 ; of dramas, 294, 303.
Action for libel, 262 ; for infringe-
 ment of copyright, 295.
Actors, fund for decayed, 305 ;
 treated as vagrants, 306 ; ancients
 treated as disreputable, 308 ;
 women, first time, 309 ; right to
 applaud and hiss, 310.
Addison on House of Commons,
 107 ; on Sunday, 353.
Addresses, copyright in, 265.
Advertisement, duty on newspapers,
 57 ; railway, of convicted per-
 sons as a warning, 165 ; of clerk
 not being authorised to collect
 money, 169.
Advowsons, number of, and in whose
 hands, 397 ; origin of, 390 ; kinds
 of, 391 ; as appurtenant to land,
 391 ; may be severed from land,
 391 ; not a profit of land, 391 ;
 cannot be granted for years,
 391 ; clergy purchasing, 392 ;
 infant making presentation, 393 ;
 widows and bankrupts and mort-
 gagors presenting, 393 ; death of
 owner of, 393 ; executor of patron
 can present, 393 ; giving to
 parishioners, 394 ; cestuique trust
 nominating, 394 ; coparceners
 holding, 395 ; corporations having,
 395 ; Crown is paramount patron,
 396 ; held by Papists, 396 ; uni-
 versities then nominate, 396 ; as
 donatives, 397 ; simony as to
 presentations, 398 ; sale of, when
 incumbent in dying state, 401 ;
 resignation bonds, 401 ; statute
 making bonds valid if for a near
 relative, 403 ; vacancy and ex-
 change of benefices, 404 ; usurpa-
 tion of benefices, 405 ; presenta-
 tion of priest to benefice, 421.
Allybone, J., as to criticising
 government, 78.
Almanacs, copyright in, 247, 282.
Alms in church, 468.
Altering patent, 339.
Ancients, on freedom of speech and
 thought, 42 ; on public opinion,
 76 ; on libels against the Sove-
 reign, 87 ; their punishments for
 libel, 224 ; as to festivals and
 holidays, 353 ; as to swearing,
 365 ; officers of church inferior to
 priests, 407 ; as to disqualifica-
 tions of candidates for holy
 orders, 420 ; on celibacy, 482 ;
 on heresy, 501 ; on toleration, 516.
Anne, Queen, bounty, 439.
Apology for libel in newspaper,
 238.
Apostacy as crime, 62.
Appeal from Ecclesiastical Courts,
 493.
Apples, tithe of, 457.
Archbishop, visitor of bishops, 408 ;
 precedence of, 408.
Archdeacon, his jurisdiction, 415 ;
 appointed by bishop, 415 ; appeal
 to bishop, 416, 493.
Arrest, of seditious and blasphemous
 libellers, 97 ; of libeller by judge's
 warrant, 212.
Articles, contravening the, 502.
Assignment of copyright in MS.,
 260 ; in printed book, 279 ; in
 dramas, 303 ; of patent right, 334.

- Attorney-General's *ex officio* information, 99; origin of practice, 100; procedure on, 101; policy of, 102.
- Augustus first watched defamatory libels, 43.
- Authors, criticisms on, 138; ridicule of, 171; who are, 271; when not having first copyright, 281; contracts of, with publishers, 300; joint adventure with publisher, 300.
- BACON on amending laws of church, Preface, vi.
- Bakers' work on Sunday, 356.
- Baldacchino, if legal, 431.
- Bank Holidays as to bills of exchange, 361.
- Bankrupt, calling a tradesman, 176, 178; owner of MSS. becoming, 263; owner of copyright of printed book becoming, 279.
- Baptism, duty of clergy as to, 471.
- Baptists, inscription on tombstone, 434; *see* Dissenters.
- Barbauld on toleration, 523.
- Baxter tried for reflecting on government, 78; as recusant, 520.
- Bees, tithe of, 457.
- Behaviour, security for, as punishment for libel, 148, 212, 226.
- Bells of church, 430.
- Benefices, 390 (*see* Advowsons, Church, Clergy); presentation of priest to, 421; pluralities, 444; union of, 445.
- Bible, ridiculing and denying, 66; copyright in, 284.
- Bill of exchange on Sunday, 361.
- Bill of Rights as to right of petitioning, 33.
- Birmingham, example of seditious libel there, 83.
- Bishop, as to obedience to law, 78; libelling for seeking preferment, 112; and clergy anciently lived together, 389; advowson of one who is appointed, 396; original mode of appointing, 407; is the king's judge in ecclesiastical causes, 408; subject to archbishop, 408; appointment by *congé d'élire*, 409; consecration of, 409; as peer of Parliament, 410; cannot sit on trial of peers for capital offences, 410; deprivation, 411; powers and duties of, 411; vacancy in office, 413; may now resign, 414; may appoint suffragan, 414; power to order employment of curates, 417; as to qualifications of priests, 422, 424; license for non-residence, 440; committing waste, 442; old law as to hunting, 487; jurisdiction of, 493; has veto in criminal suits against clergy, 497; old law as to conviction of, 497; prohibiting clergymen in his diocese, 505.
- Bishops, petition against sitting of, in Parliament, 36.
- Bishops, Seven, tried for abusing petitioning, 33; tried for libel, 78; required to give sureties of peace, 212.
- Blasphemy, law as to, 61; apostacy, 62; early statutes, 63; existing statutes as to, 64; common law as to, 65; power of juries as to, 66; remedy for, 67; punishments for, 68; arresting speakers and writers of, 97.
- Bona fide* travellers on Sunday, 364.
- Bonds, resignation, 401.
- Books, criticisms of, 138; early practice as to fixing price of, 242; modern practice as to, 274; what are, 271, 274; *see* Copyright.
- Bookseller, how far liable for libels sold, 159.
- Booths for plays, 309.
- Breach of peace, if libel is, 148, 227.
- Breach of privilege, 106; instances of committal, 110, 112; modes of punishing, 114; House ordering Attorney-General to prosecute, 114.
- Bread Acts as to Sunday, 357.
- Bunyan, imprisonment of, 520.
- Burdett, Sir F., petitions as to, 36; committal of, 113; trial for, and place of trial, 213.
- Burke, on stirring up discontent, 79; on *ex officio* informations, 102; on argued judgments, 121; on libel law, and juries, 220; on grades of clergy, 406; on church establishments, 475, Preface, ix.; on persecuting Papists, 537.

Burning libels, 228 ; heretics, 501.
Business, slandering one in, 175.

CAIRNS, L., on trade mark, 343.

Calling names, how far libellous, 164, 168.

Camden, L., on seditious libel, 80 ; on House of Commons, 108 ; on privilege of Parliament, 202 ; on juries in libel cases, 220, 221 ; on copyright, 257.

Canning on toleration, 528.

Canon law, alleged divine origin of, 379.

Canons of English Convocation how far binding, 383 ; if new can be made, 384 ; Parliament can alter, 386 ; two modern canons made, 386 ; how far part of common law, 472.

Catholics, *see* Roman Catholics.

Celibacy of clergy, 482.

Censorship of the press, early practice, 50 ; abolition, 51 ; of plays still retained, 305 ; of tombstones, 433.

Ceremonies of public worship, 472 ; leading, 474 ; test of legal, 477 ; remedy for changing, 498.

Certifying places of worship, 507.

Chairman of public meeting, powers of, 27.

Chamberlain, L., licenses plays, 307 ; also theatres, 308.

Chapel of ease, 417.

Chapter, Dean and, 414.

Character, personal, how acquired and protected, 8 ; master's libel excused in giving servant's character, 186.

Charities of dissenters, 530 ; Lady Hewley's, 530.

Charles I., libel on, 89.

Charles II., libel on, 89.

Chart, copyright in, 312.

Chartist petition, signatures to, 35 ; arresting lecturers on, 97.

Chastity, slander on, when a cause of action, 174.

Chatham, L., on bold language at public meetings, 85.

Chelmsford, L., on Sunday Acts, 358.

Chesterfield, L., opposing the dramatic censorship, 306.

Chillingworth on religious belief, Preface, viii. ; on toleration, 522.
Christian religion, public denial of, 64 ; blasphemy as to, 66 ; statutes against, 67.

Christianity, if part of law of England, 351.

Church and state, meaning of words, 371 ; supposed alliance between, 372 ; alleged submission of clergy, 372 ; Royal supremacy in church affairs, 374 ; coronation oath, 376 ; meanings of word "church," 376 ; Protestant Episcopal Church, 376 ; doctrines of, how far protected by law, 378 ; alleged divine origin of canon law, 379 ; councils and convocations of, 380-386 ; general control of property and ecclesiastical commissioners, 387 ; Henry IV. asked to seize revenues, 388 ; origin of parishes, 389 ; advowsons, 390-400 ; presentation of priest to, 421 ; parson's freehold in, 427 ; consecration of, 428 ; rates, 429 ; repairs of, 429 ; bells, 430 ; organ, 430 ; altar and holy table, 431 ; ornaments in, 431 ; baldacchino, 431 ; reredos, stations of cross, crucifix, flowers, 432 ; collecting alms in, 468 ; ceremonies in, 476 ; processions in, 477 ; cross, kneeling, incense, &c., 477 ; exempt from poor rate, 488 ; order in seats and pews, 435 ; right to keys of, 435 ; compelling attendance at, 519.

Church Discipline Act, 497.

Churchwardens, duties, 434 ; breaking into church, 435 ; duty as to pews, 435 ; order in church, 435 ; dissenter as, 435.

Churchyard, inscription on tombs in, 433 ; repair of fences, 435.

Clarendon's History, copyright of, 258.

Clergy (*see also* Church), being libelled, 153 ; slandered for immorality, 176 ; libelling their parishioners, 191 ; slandered from pulpit, 206 ; once bound to read Act against profane swearing, 367 ; alleged submission of, 372 ; bound by canons, 383 ; purchasing advowson or presentation, 392 ; how far bound to obey bishop,

- 412; numbers of, in England and Wales, 418; residence of, 438; dilapidations, 441; letting of clergy house, 443; pluralities, 444; union of benefices, 445; tithes, 447; rectors and vicars, 451; duties as to communion, baptism, marriage, 470; varying public worship, 475; position of, during public worship, 478; vestments of, 478; engaging in trade, 480; farming land, 481; entering Parliament, 481; holding municipal offices, 482; celibacy of, 482, 484; recreations of, 486; exemption from taxes, 487; receiving confessions, 488; resigning office, 489; remedy against, under Church Discipline Act, 497; under Public Worship Act, 498; committing criminal offences, 498; schism and heresy, 498; contravening Thirty-nine Articles, 503; immorality and drunkenness of, 504; performing service in another parish, 505; excommunication, suspension, deprivation, 509; peculiarities in procedure against, 514; costs as to, 514.
- Clerk receiving a libel on his master, 157.
- Clubs with unlawful objects, 24.
- Coaches on Sunday, 358.
- Cobbett's libel on L. Hardwicke, L.L., 94, 170.
- Cockburn, C.J., on criticising public men, 92.
- Coffee-houses, if king could shut up, 19.
- Collecting alms in church, 468.
- Commendam, benefices held in, 405.
- Comments on judges, 124.
- Commission, High Court, 495.
- Committal for breach of privilege, 110.
- Common Prayer, copyright in, 284; authority of, 475; depraving of, 502.
- Commons, House of, irresistible power, 106, 108; if it can go wrong, 108; publishing debates in, 115; *see* Parliament.
- Communion, duty of clergy as to, 470; ceremonies during, 478; vestments during, 478
- Commutation of tithes, 461.
- Complaints to official superior, if libellous, 193.
- Confession at bar of Parliament, 120; clergy receiving, 488.
- Congé d'élire* as to bishops, 409.
- Congregations, disturbing, 489; of dissenters appointing pastors, 531; changing their creed, 532.
- Consecration of bishops, 409; of priests, 423; of churches, 428; bishop prohibiting service in unconsecrated building, 505.
- Conspiracy to hiss an actor, 311.
- Constitution, libels on the, 95.
- Contagious disease, libel imputing, 179.
- Contempt of Court, 121; instances of, 122; law reports not contempts, 126; premature reports, 127; summary punishment for, 128; publishing early report of long trial, 129; what courts can commit for contempt, 130; *ex parte* cases, 130; for acts out of court, 132; what courts can commit, 134; punishment for, 135; of inferior judges and courts, 136.
- Contempt of Parliament, 106; *see* Privilege.
- Contracts of printers and custom of trade, 48; of authors and publishers, 300.
- Contradicting a libel, effect of not, 216.
- Conventicle at first deemed seditious, 78.
- Conventicle Act, 520, 524.
- Convocation, origin of, 381; power to make canons, 382; power to make new canons, 384; as means of checking heresy, 386; appeal from inferior courts, 493.
- Coparceners having advowson, 395.
- Copying a libel, how far criminal, 158.
- Copyright, as a property, 14; first notions of, in English law, 241; early statutes as to, 242; first Act of Anne on, 243; its provisions, 244; its practical effect on authors, 245; progress of early decisions as to, 246; reasons why copyright does not differ from other rights, 248;

Talfourd, Landor, and Disraeli on, 249; reasons alleged for confiscating copyright, 249; what is meant by perpetual copyright, 251; as easily identified as other property, 252; Erle, J., on copyright, 253; chief cause of differences between early judges as to, 254; false analogies in early treatment of, 255; not a monopoly, 256; nature of, in MS., 258; lending MS. to friends, 258; assigning MS., 260; if there can be dedication of MS. to public, 261; publishing MS. against owner's will, 262; bankruptcy of owner of MS., 263; in lectures and addresses, 265; in unpublished letters, 266; if letters are joint property of writer and receiver, 268; publishing letters without writer's consent, 270; in letters to newspapers, 270; who is an author and what is literature, 271; first publication in United Kingdom, 272; international, 272; treaties as to international, 273; fixing price of books and compelling republication, 274; what is a book, 274; in newspapers, 275; in blasphemous, immoral, and seditious books, 276; date of publication, 277; registering books, 278; assignment of, 279; is personality, 279; when author has not radical right, 281; of Crown, 281; of University, 283; of Crown in Bible and Prayer Book, 284; Crown copyright in statutes and proclamations, 285; in law books, 285; infringement of, generally, 287; in Directories, and quasi-mechanical books, 289; infringement by books on same subject, 290; infringement by copying title of book, 290; infringement by way of a review, 291; infringement by adding notes, 291; infringement by abridgment, 292; infringement by importing pirated copies, 293; interference with, by recitation and dramatising, 294; remedy by action for infringement, 295; by penalties, 297; remedy by

injunction for infringement, 297; in periodicals, 299; in dramas, 301; in engravings, maps, charts, 312; in lithographs, 312; in paintings, drawings, and photographs, 314; in sculptures, 316; in designs, 317; distinguished from patent right, 319.
 Coronation oath, 376.
 Coroner, right to regulate entry of public, 125; not liable for slander, 197.
 Corporation Act of 1661, 520; in city of London, 525.
 Corporations, libelling and being libelled, 153.
 Correspondence, copyright in, 266.
 Costs, in criminal prosecutions for libel, 230; in actions for libel and slander, 240; in criminal suits of clergy, 514.
 Councils of church, 380.
 Counsel in courts slandering third parties, 185.
 County Court judge can in some cases commit for contempt, 136; not liable for slander, 197.
 Court, contempt of, 121; right of public to enter, 125; publishing premature reports, 128; reports of *ex parte* proceedings, 130; reports where no jurisdiction in, 131; contempt for acts out of, 133; what courts can commit for contempt, 135; inferior courts and judges, 136.
 Cranworth, L., on trademark, 340; on Christianity as part of the law, 352; on dissenters' mode of worship, 533.
 Credence table, legal, 431.
 Creditor libelling his debtor, 191.
 Creed of dissenters, changing of, 532.
 Crime, libel or slander imputing, 163.
 Criminal information for libel, 99, 207; offences of clergy, 497.
 Cross, legality of, in churches, 432, 477; sign of, 477.
 Crown, speech not gift from, 4; right to petition, 30; prerogative as to press, 46; license as to publishing news, 55; proclamation of, as to seditious libels, 84; libels on, 85; older doctrines as

- to libels on, 87; libels on James I., Charles I., Charles II., 89; Wilkes's libel on, 89; Junius's libel on, 90; libelling the king as insane, 91; statutes as to intimidating, 91; copyright of, 281; copyright in almanacs, 282; may use patents without payment, 320.
- Crucifix in church, 432.
- Curate, perpetual, 416; has not a benefice, 417; stipendiary, 417; bishop may order employment of, 417; bishop may revoke license of, 418; stipend of, 418; numbers of in England, 418; right to chair at a vestry, 438.
- Curran on liberty of press, 41.
- Cursing, 364; punishment, 365.
- Custom of trade of printers, 48; as to tithes, 462; as to dissenters' trusts, 530.
- Custos morum*, doctrine of, 69.
- DAMAGES, in actions for libel, 239.
- Dead, libels on the, 154.
- Dean and Chapter, 414; their preferments, 415; regulation of estates and endowments, 415; rural, 416; of peculiars, 416.
- Debates in Parliament, publication of, 115.
- Debating societies, lawfulness of, 26; on Sundays, 361.
- Dedication of MS. to public, 261; of patent, 336.
- Defamation, *see* Libel.
- Definition of liberty of press, 38; blasphemous libel, 62, 65; immoral libel, 70; of seditious libel, 80; of personal libel, 144.
- Degradation, a punishment of clergy, 511.
- Del., word denoting engraver's mark, 314.
- Delegates, court of, 494.
- Denman, L., as to *ex officio* information, 103.
- Deprivation as a punishment, 511.
- Desecration of church, 428.
- Dilapidations, ecclesiastical, 441, 443.
- Directories, copyright in, 289.
- Disraeli on copyright, 249.
- Dissenters, intolerance as to, 515; Toleration Act, 521; registration of meeting-houses, 523; disturbing worship, 523; serving as sheriffs, 525; trust property and mode of preserving it, 529; interpretation of deeds of trust, 529; their charities, 530; length of possession of property, 531; mode of appointing pastors, 531; changing their creed, 533; their civil and religious freedom, 534; marriages of, 534; Quakers and Unitarians, 535; Roman Catholics as, 536; Jews as, 545; street preaching, 549.
- Distress, recovery of tithe rent-charge by, 465.
- Disturbance of public meeting, 27; of divine service, 489, 523.
- Divine origin of canon law, 379; of tithes, 449.
- Divine service, disturbing, 489.
- Donative advowsons, 397; origin of, 397.
- Doors of dissenting chapels to be open, 523, 535, 541.
- Dramas, copyright in, 301; assignment of, 303; infringement of right in, 304.
- Dramatising a novel, if an infringement, 294.
- Ducking of scolds, 147.
- EASTER dues, recovery of, 466.
- Ecclesiastical commissioners, 388; extent of property, 388.
- Ecclesiastical courts, remedy for defamation in, 208; criminal jurisdiction of, 497; interpreting Prayer-book, 503.
- Ecclesiastical jurisdiction, early notions, 370; generally, 491; appeal from courts, 493; watched by temporal courts, 494; excesses of, 495.
- Ecclesiastical laws subject to amendment, 350.
- Editor of newspaper, how far liable for libels, 161; calling one a felon editor, 165.
- Egyptians, trial of the dead by, 154.
- Election of vestries and corporation officers on Sunday, 355.
- Ellenborough, L., on poor men as politicians, 79; definition of a seditious libel, 80; as to libelling the king, 91; as to ridiculing

- ministers of state, 94 ; on repeating a libel, 183.
- Enchantment, pretending powers of, 368.
- Engravings, copyright in, 312 ; registration of, 313.
- Entertainment, houses of, on Sunday, 361.
- Episcopal church, 376 ; divine right of, 379.
- Erle, J., on copyright, 253.
- Erskine, on right to reputation, 6 ; on right of petitioning, 34 ; on liberty of the press, 40 ; on blasphemy, 65 ; as to bold language at public meetings, 85, 86 ; on free discussion, 96 ; on law not punishing the thoughts, 157 ; on liability of shopkeepers for libels sold, 159 ; contention of, as to juries in libel cases, 218, 220.
- Ex officio* information for seditious libel, what, 99 ; origin of, 100 ; procedure in, 101 ; policy of, 102.
- Exchange of benefices, 404.
- Excommunication as punishment, 508.
- Excusable libels on privileged occasions, 184.
- Extending patent, 339.
- FACTORY work on Sunday, 358.
- Faculty to alter parts of church, 413 ; discretion of bishop as to, 412 ; churchwardens' duty to get, 413 ; granting a pew, 436.
- False news, early doctrines as to publishing, 53 ; maliciously publishing, 56.
- Farming, clergy as to, 481.
- Fees, baptism and surplice, 467.
- Felon, calling one a, if actionable, 165.
- First-fruits in benefices, 404.
- Fish, catching, on Sunday, 360.
- Five Mile Act, 521.
- Flogging, public writer discussing, 79.
- Foreign author of book, 272 ; foreign inventor of patent, 328 ; owner of trademark, 341.
- Forgery of trademark, 345 ; of artist's marks on pictures, 345 ; of mark on engraving, 314.
- Forms of legal writs, copyright in, 232.
- Fortune-telling, punishment, 368.
- Fox, C. J., on restrictions on public meetings, 20 ; on liberty of the press, 42 ; on libelling the Revolution, 96 ; on toleration, 527.
- Fox's Act as to libel cases, nature of contention, 217.
- France, free press in, 46 ; harassing public writers, 79.
- Frankalmoigne, 427.
- Freehold of parson in church and churchyard, 427 ; in churchyard as to inscriptions on tombs, 433 ; estate in tithes, 464.
- Freemasons' meetings not unlawful, 25.
- Friends, slander causing loss of, no cause of action, 174 ; libel, when excused as between, 189.
- GAME catching on Sunday, 359.
- Glebe land, letting of, 443 ; clergy farming, 481.
- Good Friday, L. Mansfield sitting on, 361.
- Gordon riots and rights of petitioning, 33 ; putting down, 35.
- Gouty, calling a great man, 181.
- Government, criticising, 76 ; early views as to writing against, 77 ; libels on ministers of state, 92 ; libels on the constitution, 95.
- Grenville on toleration, 528.
- Guizot on the Reformation, Pref. viii.
- HABEAS CORPUS, sued by those committed for breach of privilege, 110.
- Hackney coaches on Sunday, 358.
- Hale, C.J., on privilege of Parliament, 111 ; on particularity in the laws, Preface, xiii.
- Hall, R., on stirring public discontent, 79.
- Handwriting of libel, how proved, 159.
- Hardwicke, L., on liberty of press, 38.
- Hatred and contempt, as caused by libel, 169.
- Heir of dead person libelled, 155.
- Heresy, if Convocation can check, 386 ; trial and punishment for, 499 ; reason for burning for, 501.
- High Commission Court, 495.
- Highway, public meetings held on, 21 ; preaching on, 549.

- Hissing plays, 310.
Holland, L., on *ex officio* informations, 101.
Holt, C.J., as to reflections on government, 92; as to ridicule being cause of action, 170; on Parliamentary privilege, 199; as to dissenters, 525.
Holy orders, indelibility of, 489; *see* Clergy.
Holy table in church, 431.
Hone's trial for blasphemy, 66.
Hops, tithe of, 450, 464.
House of Commons and of Lords, *see* Parliament.
House of Lords (*see* Parliament), appointing reporter of state trial, 129, 287.
Hunt, Leigh, libel as to flogging, 94.
Hunt, trial in 1820 for sedition, 21.
Hunting of clergy, 486.
- IMMORAL libels, 69; definition of, 70; seizing and destroying, 70; punishment of, 71.
Importation of printed copies as infringement, 293.
Imprisonment, arresting libellers, 212; limit of, for libel, 225.
Impropriation of tithes, 452.
Incense in church, 477.
Incontinence, punishment for, 496.
Indelibility of holy orders, 490.
Indemnity Acts for dissenters, 525.
Independents, *see* Dissenters.
Indictment for libel, 210; form of, 213; punishment, 223; costs on, 230.
Induction of priest to benefice, 425.
Infant signing presentation, 393.
Inferior officers of church in ancient times, 407.
Information, *ex officio* for libel, 99; policy of, 102; criminal for libel, 207; form of, 213.
Infringement of copyright, 287; by books on same subject, 290; by copying title, 290; by a review, 291; by adding notes, 291; by memory or recitation, 294; action for, 295; injunction for, 297.
Infringement of patent, 336.
Inhabitant, right to pew, 436.
Injunction, not allowed for libel, 230; for infringement of copy-
right, 297; for infringement of patent, 337.
Innkeeper and *bona fide* traveller, 364.
Imnuendo in pleading in action for libel, 234.
Inquisition, the, 518.
Institution of priest to benefice, 425.
Interrogatories in actions for libel, 237.
Intimidating the sovereign, 91.
Intolerance a law of nature, 516; statutes of, 519; *see* Toleration and Dissenter.
Inventor of patent, 319.
- JEFFREYS, C.J., as to false news, 55; as to the doctrine of Queen's Bench being *custos morum*, 69.
Jesuits, 543.
Jews, their Sabbath, 354; their religion, 545; ancient treatment of, 546; contracts and property of, 547; their civil and religious liberty, 548.
Johnson, Dr., parliamentary debates by, 117.
Joint owners in patent, 330, 334.
Jones Gale, breach of privilege by, 120.
Judge, what, can commit for contempt, 135; not liable for slander, 195; when may be committed by Parliament for molesting officers, 201; warrant of, to arrest libeller, 212; their views as to juries in libel cases, 217; his function in libel criminal cases, 222; functions of, in actions for libel, 238; copyright in their judgments, 286.
Judicial Committee of Privy Council, appeal to, 494.
Judicial proceedings, slander in course of, 195.
Junius, his secret, 58; his libel on the king, 90; his power and secrecy, 103.
Jurisdiction of Parliament and courts in conflict, 108, 202.
Jury, importance of, in seditious libels, 81, 82; functions of, in deciding libel cases, 217; power in jury cases, 221; finality of verdict in libel cases, 222.
Justice of the peace, whether he

- can commit for contempt, 136; libelling him, 179; not liable for slander in course of duty, 197; charge of libel before, 210; origin of jurisdiction over libels, 211; licensing theatres, 309; liable to fine, if he do not fine swearers, 366; jurisdiction of, in tithe rentcharge, 466.
- KEEPING** a place, meaning of words, 309.
- Kentish petition proceedings, 35.
- Kenyon, L., as to seditious libel, 81; as to patents, 322; on Sunday Acts, 357.
- Keys of church, right to, 435.
- King, the, *see* Crown.
- Kneeling at bar of Parliament as punishment, 119; of clergy during service, 477.
- LAME**, calling one, 171.
- Laudor on copyright at common law, 249.
- Lansdown, L., as to seditious libel, 81.
- Latin grammar, copyright in, 283.
- Laughing at a libel, if a publication of it, 158.
- Law does not punish the thoughts, 157.
- Law books, right to print formerly, 117; copyright in, 285.
- Law courts and Parliament contrasted, 107.
- Law courts and legal business on Sunday, 360.
- Law reports, copyright in, 286; copyright in head-notes to, 293.
- Laws of God as part of law, 351.
- Lay rector, 452.
- Learning of priests, examined by bishop, 422.
- Lease of ecclesiastical property, 443.
- Lectures, copyright in, 265.
- Lecturers in Church of England, 419; licensed by bishop, 419; approval by bishop, 425.
- Lecturing, public, 13; places for, 29; admission to, 30; riot at, 30.
- Letters, copyright in unpublished, 266; if they are joint property of writer and receiver, 268; publishing without writer's consent, 270; copyright in letters to newspapers, 270.
- Letting ecclesiastical property, 443.
- Lex et consuetudo Parliamenti*, 111.
- Libel, blasphemous, 61, 67; obscene and immoral, 69; seditious, 74; on Parliament, 105; ridicule of author by critics, 139; on personal reputation, 141; definition of, 144; distinction of slander, 145, 146; if scolding is, 147; threat to publish, 148; if constructive breach of peace, 148; if malice is ingredient, 149; construction of, 151; medium of libellous act, 152; libelling classes of persons, 153; libels on the dead, 154; publication essential to, 156; if publication is *per se* a crime, 157; mode of proving publication, 159; liability of bookseller and shopkeeper, 159; liability of proprietor of newspaper for, 160; liability of third person for causing publication, 162; imputing crime, 163; mere scurrility, 164; of offences past and punished, 165; what was once offence, 166; attempts to commit crime, 167; not clearly imputing crime, 167; calling scurrilous names, 168; exposing to hatred and contempt, 169; imputing immorality or unchastity, 172; the kind of special damage following on charge of immorality, 173; words imputing unchastity when printed, 175; libel on professional conduct, 175; rival tradesmen slandering each other, 178; defaming one holding public office, 179; libelling one holding office of profit, 180; action of *scandalum magnatum*, 180; repeating a slander or libel, 182; excusable libels on privileged occasions, 184; excuse in giving servant's character, 186; excuse in confidential communications, 189; excuse in protecting pecuniary interest, 191; excuse in self-defence, 192; privileged occasion not to be abused

- to cloak malice, 192; complaints to official superior, when libellous, 193; excuse in judicial proceedings, 195; excuse of, in justices of peace and coroners, 197; excuse in publishing speech delivered in Parliament, 197; excuse in publishing Parliamentary papers, 199; mode of Parliament protecting printers of papers, 200; excuse in publishing law reports, 203; excuse in publishing reports of public meetings, 204; excuse in slandering from pulpit, 206; remedies for, 207; old remedy in Ecclesiastical Court, 208; remedy by criminal information, 208; conditions of granting, 208; remedy by indictment, 210; jurisdiction of justices of peace over, 211; arrest of libeller, 212; form of indictment and information, 213; how far truth of libel a defence, 213; defence that libel was published for public benefit, 215; effect of not contradicting, 216; functions of juries in deciding libel cases, 217; unsatisfactory state of law before Fox's Act, 219; practice since Fox's Act, 220; finality of verdict of jury in, 222; punishment of, 223; pillory for, 225; limit of imprisonment for, 225; mitigation of punishment for, 226; security for good behaviour as punishment, 226; seizing and destroying blasphemous and seditious, 228; ordering libel to be burnt, 228; no summary remedy or injunction for, 230; costs on criminal prosecutions for, 230; remedy for slander and libel by action for damages, 232; the pleadings in such actions, 233; defence to action that libel is true, 234; evidence on actions, 235; when libel said to be substantially true, 236; interrogatories and evidence in cases of libel, 237; defence for libels in newspapers, 237; functions of judge in trial of actions for, 238; damages in actions for, 239; limitation of time for actions, 239.
- Liberty of press defined, 38; *see* Press.
- License to hold public meetings, 20; to keep theatres, 309; to use patent, 335; for non-residence, 440.
- Licensing Act of 1662, 45; as to public-houses on Sunday, 363.
- Literature, what is, 274.
- Lithographing copy is infringement, 296.
- Littledale, J., as to seditious libels, 83.
- Locke on toleration, 527.
- London city fining dissenters, 525.
- Luther on heresy and persecution, Preface, x.; his *Table Talk* and copyright of Captain Bell therein, 243; as to ceremonies, 472; on indelibility of holy orders, 490.
- Lyndhurst on Copyright Act of Anne, 243; copyright is not monopoly, 256.
- MACAULAY on publishing parliamentary debates, 116; on toleration, 523.
- Mackintosh on liberty of press, 41; as to criticising government, 75; on definition of seditious libel, 80; on juries in libel cases, 221.
- Magnatum, scandalum*, 180.
- Malice in libels, what, 142; when privilege used to cloak, 193.
- Manager of theatre, his copyright, 281; his powers, 310.
- Mansfield, L., as to criticising government, 75; on sedition and high-treason, 80; as to *ex officio* prosecutions, 103; as to military commanders libelling each other, 194; doctrine as to juries in libel cases, 218; on Sunday Acts, 357; sitting on Good Friday, 361; on toleration, 525; on Roman Catholics, 526.
- Mansion House and dissenters, 525.
- Manuscript, copyright in, 258; lending to friends, 258; copyright in, assignable, 260; dedication of, to public, 261; lithographing, 263; bankruptcy of owner of, 263.
- Market garden, tithe of, 466.
- Marriage, lost by a slander on one's morality, 172; duty of clergy as to, 471; of clergy, 482; of dis-

- senters, 534 ; of Quakers, 536 ; of Jews, 546.
- Married woman suing for slander of chastity, 172, 174.
- Master, libel excused in giving servant's character, 186 ; officiously informing about servant's misconduct, 188.
- Mayor attending meeting-houses, 524, 543.
- Meeting, public, generally, 12 ; freedom of, 19 ; if king's license ever needed, 20 ; the first held, 20 ; once not allowed without magistrates' license, 20 ; Fox as to restrictions on, 20 ; restriction as to place of, 21 ; held on highway, 22 ; in public parks, 22 ; within a mile of Parliament, 24 ; in societies and clubs, 24 ; debating societies, 26 ; protection against disturbance, 27 ; chairman's powers, 28 ; lectures and addresses at, 29 ; to petition Crown and Parliament, 30 ; proclamation of Crown as to seditious, 84 ; sedition at, 85 ; bold language at, 85 ; reports of, not protected, 204.
- Meeting-house, registration of, 525.
- Member of Parliament committing breach of privilege, 113.
- Merchandise Marks Act, 345.
- Military men, libellous complaints between, 194.
- Milk, tithe of, 460.
- Milton, liberty of thought, Preface, xiv.
- Mines, working in, on Sunday, 358 ; working, on ecclesiastical property, 442.
- Ministers of State, libels on, 92 ; of dissenting congregations, how appointed, 531.
- Mixt tithe, 456.
- Modus of tithe, 461 ; when rank, 462.
- Monasteries, suppression of, 485.
- Monboddo, L., on copyright, 258.
- Monition in Ecclesiastical Courts, 512.
- Monopoly, copyright is not, 256, 319 ; statute of, 323.
- Monument inscriptions, 433.
- Mortgage of advowson, 393.
- Municipal offices, clergy holding, 482.
- New invention, what is, 325.
- News, early doctrine as to publishing, 52 ; statutes as to false news, 53 ; right to publish generally, 54 ; Scroggs and Jeffreys as to, 55 ; maliciously publishing false, 56 ; special laws as to newspapers, 56 ; earliest newspapers, 56 ; freedom to publish, and suppression, 57.
- Newspapers, special laws as to, 56 ; stamp duty on, 57 ; advertisement duty, 57 ; paper duty, 57 ; suppression of, 57 ; discovery of proprietors of, 58 ; postage facilities, 58 ; advertisement for stolen property, 59 ; publishing debates in Parliament, 115 ; publishing trials at law, 128 ; comments on public officers, 136 ; comments on books and pictures, 138 ; proof of libel published in, 159, 161 ; liability of proprietor of, for libels, 160 ; third party causing libel to be inserted in, 162 ; defence of libels in, 237 ; apology for libel in, 238 ; copyright in letters to, 270 ; copyright in newspapers, 275.
- North, L., as to petition for dissolution, 34 ; as to *ex officio* informations, 103.
- Novel, dramatising, not an infringement, 295.
- Novelty as an element of patent, 325.
- OATH, unlawful societies and clubs with, 24 ; profane and cursing, 364 ; of supremacy, 376 ; coronation, 376.
- Obscene libels and publications, 69 ; *see* Immoral.
- Obventions, recovery of, 466.
- Offences of clergy, 497.
- Offerings or Easter dues, 466.
- Offertory in church, 468.
- Office, slandering one in his, 180.
- Officers in church inferior to priests in ancient times, 407.
- Official superior, libellous complaint to, 193.
- Opera, copyright in, 302 ; requires license, 307.
- Orator, copyright of, in speeches, 262.

Ordinary calling on Sunday, 356.

Organ in church, 430.

Ornaments in church, 431; inert and active, 432; crucifix, 432; stations of cross and reredos, 432; flowers, 432; rubrics as to, 480.

PAINTING, libel by, 152; copyright in, 314; imitating marks of painter on, 315.

Palmistry, offence of, 369.

Pantomime requires license, 307.

Paper duty, repeal of, 57.

Papers, wearing, as punishment, 103.

Papers, Parliamentary, protected, though libellous, 200.

Papists holding advowsons, 396; *see* Roman Catholics.

Parishes, origin of, 389; smallest in England, 390; clergy invading another, 505.

Parishioners electing parson, 394; ballot lawful, 394; electing lecturers, 419.

Parke, B., on patents, 322.

Parks, public, meetings held in, 22.

Parliament, public meetings within a mile of, 24; right to petition, 30; resolution of, as to seditious libel, 85; and law courts contrasted, 107; privilege of, 106; early instances of 109; punishment of breach of privilege, 114; publishing debates in, 116; punishing for breach of privilege, 119; if pillory is legal punishment of Parliament, 119; speech delivered in, publication of, 197; excuse of libels in papers ordered by, 199; protection of its officers in publishing papers, 200; conflict with courts ended by a statute, 203; clergy entering, 481; Roman Catholics, 540; Jews, 548.

Parodies of Scripture, Hone's trial for, 66.

Parsonage, *see* Residence.

Parson's freehold in church, 427; division into rectors and vicars, 451.

Partners being libelled, 153.

Paten, elevation of, in church, 477.

Patent right, generally, 16, 318;

distinguished from copyright, 319; from monopolies, 319; confusion in early ideas of, 321; Kenyon, Parke, Tenterden, as to, 322; not a species of contract, 322; subject of, 323; implies something corporeal and material, 324; novelty as an element, 325; utility as an ingredient, 327; prior publication of, 327; including several distinct things, 329; for joint invention, 330; for a principle or process, 330; requirements of the specification, 331; must state what is new and old, 332; intelligible to workmen, 333; good faith in disclosing, 333; registration of, 334; more than twelve persons may hold, 334; assignment of, 334; bankruptcy of owner, 334; joint owners in, 334; assignment of, 334; license to use, 335; abandonment of, 336; infringement of, 336; injunction against infringement, 337; questions for jury on trial of action, 338; extending, altering, and repealing, 339.

Paterines, a blasphemous sect, how treated, 68.

Patron, 390; *see* Advowson.

Payment into court in actions for libel, 238.

Peace, breach of, if libel is, 148, 227.

Pecuniary interest often excuses libel, 191.

Peer, writing life of, when dead, 156; libelling by saying he resembles the devil, 170; scandalising them, 181; actions by, for scandal, 182.

Penance as a punishment, 511.

Penitence, public, 512.

Pensions for tithes, recovery, 466.

Periodicals, copyright in, 299; registration at Stationers' Hall, 299.

Perjury in Ecclesiastical Courts, 496.

Perpetual curates, 416; not removable, 416; requires no institution, 426; vicar, 452.

Persecution, St. Austin on, 518; L. Mansfield as to, 526.

- Personal tithe, 456, 461.
- Perturbation of pew, action for, 437.
- Petition to Crown and Parliament, 13; right to, 30; statutes as to, 32; signatures to, 32; Bill of Rights as to, 33; must be respectful, 34; Kentish, 35; Chartist, 35; Gordon riots, 35; as to Sir F. Burdett, 36; against bishops, 36; fraud in signatures, 37; reports of meetings to, 205.
- Pews, right to, 435.
- Photograph, copyright in, 314; is infringement of painting, 314.
- Pictures, criticisms on, 138; libels in form of, 152.
- Pig, tithe of, 462.
- Pillory, for seditious libel, 103; for breach of privilege, if legal, 119.
- Pitt, libel on, for corruption, 95.
- Players anciently treated as infamous, 308.
- Plays, copyright in, 301; assignment of, 303; assignment of right in, 304; censorship of, still retained, 305; hissing at, 310.
- Pluralities, 444.
- Poor rate, clergy liable to, 488.
- Pope, the, prohibiting books, 50; his jurisdiction in England, 370; could neither fine nor imprison, 371.
- Pope's letters, copyright in, 268.
- Popery, *see* Roman Catholics.
- Position of clergyman in communion, 478.
- Post office, facilities for newspapers, 59; security of letters sent by, 60.
- Potatoes, tithe of, 450, 456, 459.
- Prædial tithes, 456.
- Prayer for the Royal Family, 476.
- Prayer-book, as to worship, 474; depravation of, 504.
- Preaching in private houses, 507; Dissenting and Test Act, 524; in streets, 549.
- Presbyterian charities, 530; *see* Dissenters.
- Prescriptive pew, 436.
- Presentation, 390 (*see* Advowson, Benefice); must be in writing, 422.
- Press, liberty of, general restrictions, 14; defined, 38; L. Hardwicke on, 38; Erskine on, 40; Curran and Mackintosh on, 41; Fox and Sheridan on, 42; the ancients on, 42; introduction of, in England, 44; Licensing Act of 1662 as to, 45; censorship of, 50; special laws as to newspapers, 53, 56; restrictions on, as to blasphemy, 61; some advantages of, 79; reports of Parliamentary debates, 115; reports of courts of justice, 126; inferior courts, 136; comments on public officers, 137; on persons challenging public notice, 137; comments on books, pictures, &c., 138.
- Priests, separate order of, 406; qualifications of, 420; ancient rules as to, 421; presentation to benefice, 421; fitness for institution, 422; bishop must state reasons of rejection, 423; ordination of, 423; institution and induction, 425; freehold in church, 427.
- Principle, patent for a, 330.
- Printers, early restrictions on number of, 43; Licensing Act of 1662 as to, 45; to keep copies of prints, 47; contracts of, 48; immoral works, 48; registration of presses, 49; kneeling at bar of Parliament, 120; protected in publishing parliamentary papers, 200.
- Printers, Queen's, copyright in Bible and Common Prayer, 284.
- Private houses, preaching in, 507.
- Privilege of Parliament, 106; punishment for, 119; conflict with courts as to, 200.
- Privileged occasion, in case of libel, 184; not to be abused to cloak malice, 192.
- Privy Council, appeal to, from Ecclesiastical Courts, 494.
- Process, patent for a, 330.
- Processions, public, in streets, legality, 24; in church, 477.
- Profanation of Sabbath, 352; *see* Sunday.
- Profane swearing, 364; punishment, 365.
- Profession, slander on one's, 175.

- Profit, slandering one holding office of, 180.
- Prohibition to ecclesiastical courts, 495 ; as to tithe, 456.
- Prophecy, early statutes against, 54.
- Proprietors of newspapers, how discovered, 58.
- Prostitute, calling a woman, 168.
- Prostration of clergymen in worship, 477.
- Protecting pecuniary interests excuses libel, 191.
- Protestant Episcopal Church, 376.
- Public benefit, defence of libel being published for, 215.
- Public, dedication of MS. to, 261.
- Public-houses on Sunday, 363.
- Public libraries, gift of books to, by authors, 274.
- Public meeting, free speech at, 12 (*see* Meeting); sedition at, 85 ; reports of, 204.
- Public men, libels on, 92 ; persons challenging public notice, 137.
- Public opinion, the ancients on, 76 ; views about, 77.
- Public parks, meetings in, 22.
- Public right of entering courts of justice, 125.
- Public taxes, clergy as to, 487.
- Public use of a patent, 328, 329.
- Public worship, *see* Worship.
- Public Worship Act, 498.
- Publication of news, early notions of, 53 ; of Parliamentary debates, 115 ; of trials in courts of justice, 126 ; of a libel, when necessary, 156 ; mode of proving, 158 ; when a defence, if for public benefit, 215 ; first, of book in United Kingdom, 272 ; date of, 277 ; effect of, as regards use of book, 288 ; prior of, a patent, 327.
- Pulpit, slandering from, 206.
- Punishment for blasphemy, 68 ; for immorality and obscenity, 71 ; for seditious libel, 103 ; for breach of privilege, 119 ; kneeling at bar of Parliament, 119 ; of libel, 223 ; of heresy, 501 ; of clergy, 507.
- Puritans, petitions to the king, legality of, 88.
- QUAKERS, recovering tithes from, 467 ; their protection as to religion, 535.
- Quarter Sessions Court can commit for contempt, 135.
- Queen Anne's Bounty, 439.
- Queen's printer's copyright in Bible and Common Prayer, 284.
- RAILWAY travelling on Sunday, 359.
- Rebuilding church, 428.
- Recitation of book no infringement, 294.
- Recognisance for good behaviour in libel, 148, 212, 226.
- Recreations of clergy, 486.
- Rector, lay, freehold in church, 429 ; in churchyard, 433 ; tithes of, 452.
- Rectors distinguished from vicars, 451 (*see* Clergy) ; numbers of, 452.
- Rectory, *see* Residence.
- Recusants, statutes as to, 519 ; *see* Roman Catholics and Dissenters.
- Reformers, intolerance of, 518.
- Registration of printing presses, 49 ; of copyright, 278 ; of patents, 334 ; of trademarks, 343 ; of places of worship, 507.
- Relatives, libel excused as to, 189.
- Religion, origin of, 350 ; Guizot, Chesterfield, Wordsworth, on, 351.
- Religious houses and tithes, 452 ; orders of Roman Catholics, 544.
- Rent for license of patent, 335.
- Rentcharge tithe, 462 ; finality of settlement, 463 ; recovery by distress, 465.
- Repairs of church, 429.
- Repealing a patent, 339.
- Repeating a slander or libel, 182.
- Reporter, right to enter courts, 125 ; to report law courts, 126 ; daily reports of long trials, 129 ; reports must be fair, 131 ; verbatim, not required, 132.
- Reports of Parliamentary debates, 115, 119 ; of courts of law, 203 ; of public meetings, 204.
- Representation of a play as copyright, 302 ; as requiring license, 310.
- Reputation, Erskine's account of,

- 6; how acquired, 7; likened to property, 7.
- Reredos in church, 432.
- Residence of clergy, 438; repairs, 438, 441; license for non-residence, 440; dilapidations in, 441; modern remedy, 443; letting and alienation of, 443; pluralities, 444.
- Resignation bonds, general, 401; special, 402; of office by bishop, 414; by priest, 482.
- Revels, master of the, 305.
- Review of book as infringement of copyright, 291.
- Ridicule of author by critic, 139; how far actionable for libel, 169.
- Riot at public meeting, 28; at public lecture, 30; at theatre, 311.
- Roman Catholic holding advowsons, 396; excepted from Toleration Act, 522; former punishments of, 537; Popish recusants and their punishments, 538; sitting in Parliament, 538; schools, 540; charities and gifts to, 539; oaths required from, 540; oath of supremacy, 540; holding property, 540; relief to, by degrees, 541; registration of places of worship, 542; Emancipation Act, 542; marriages of, 543; may hold nearly all offices, 543; Jesuits, 543.
- Romilly, on discussing constitutional questions, 113; on confession of offence at bar of Parliament, 120.
- Rural dean, 416.
- Russell, Lord J., on power of House of Commons, 106; on privilege of Parliament, 202; on toleration, 528.
- SABBATH, profanation of, 352; *see* Sunday.
- Sacheverell's impeachment, 97.
- Sackcloth in penance, 512.
- Sacrilege, 434.
- St. Austin on heresy, 518.
- Scandalum magnatum*, early statutes as to, 53; action of, 180.
- Scattering libels in crowds, 157.
- Schism, offence of, 498.
- Schoolbooks, copyright in, 275.
- Schoolmaster, clergy as, 481.
- Scolding an indictable offence, 147; ducking as punishment, 147.
- Scots, ancient punishment of blasphemy, 68; of libel, 224; views of copyright, 257; copyright in Bible, 284; as to players, 308; as to laws relating to Sunday, 355; witch-finding in, 368; prayers for royal family, 476.
- Scripture, inspiration of, 503.
- Seroggs, C., as to false news, 55; suppressing newspapers, 58; prohibiting reports of trials, 126; profane swearing, 365.
- Sculpture, copyright in, 310.
- Scurrility, words if not libellous, 164; calling names, 168.
- Secretary of State opening post letters, 60; arresting by general warrant seditious authors, 97; committing seditious libellers, 98; writing to, complaining of inferior officer, 193.
- Sedition, generally, 5; citizens' right to comment on all public men, 74; Swift and Lord Mansfield and Mackintosh as to this, 75; views as to public opinion, 76; the ancients as to this, 76; early comments on public affairs, 77; finding fault with government, 78; defining seditious libel, 80; Lord Ellenborough, Camden, and Kenyon and Lord Lansdowne as to this, 81; essence of such libel, 81; correct definition of, 83; proclamations of Crown as to, 84; House of Commons resolution as to, 85; public meetings seditious, 85; physical force demonstrations, 85; unpublished writing as seditious, 86; libels on the sovereign, 86; older doctrines as to libels on sovereign, 87; modern cases of seditious writings against Crown, 89; speaking against Crown, 92; seditious libels against ministers of state, 92; Cobbett's libel, 94; libel on Pitt, 94; libels on constitution, 95; examples of these, 96; arresting seditious speakers, 97; *ex officio* information for, 99; procedure in, 101;

- policy of, 102; punishment for seditious libel, 103; libels on Parliament, 105; early instances of breach of privilege, 109; power of Parliament, 110; instances of libels on Parliament, 112; modes of punishing breach of privilege, 115; seizing and destroying libels, 228; ordering libels to be burnt, 228.
- Seizing immoral libels, 70; blasphemous libels, 228.
- Sequestration as punishment, 510.
- Sermon, Parson Prick libelling "by a, 152.
- Servant receiving a libel for master, 157; libel by master in giving character of, 186; officiously informing against, to his master, 188.
- Several offences on one day, trading on Sunday, 358; oaths, 366.
- Shaving on Sunday in Scotland, 355.
- Sheriff punished by Parliament and courts of law, 200.
- Shopkeeper, how far liable for libels sold, 159.
- Simony as to presentations, 398; in ancient times, 398; statutes against, 399; construction of, 399; gift to patron's wife, 400; sale of advowson or presentation when incumbent in dying state, 400; practice of resignation bonds, 401; statute making valid these bonds if for near relatives, 403; remedy for, 403.
- Six Acts in 1819, what, 20.
- Six Articles Act, 519.
- Slander, 141; distinguished from libel, 144; from scolding, 147; *see also* Libel.
- Societies and clubs, when unlawful, 24; debating, when lawful, 26.
- Socrates on free speech, 4.
- Solicitor, one friend consulting another about a, 189.
- Song, libel by a, 152.
- Sorcery, pretending to, 368.
- Southey's copyright in *Wat Tyler*, 276.
- Sovereign, *see* Crown.
- Speaker of House of Commons sued for libel, 199.
- Specification of patent, 331.
- Speech, tendency to free, 3; how first treated, 4; essential restraints on, 5; double aspect of, 11; distinguished from writing, 10; in Parliament, publication of, 197.
- Speeches, orator's copyright in, 262.
- Spirits of dead, messages from, 369.
- Stage play requires license, 307; what it includes, 307.
- Stage right in dramas, 294.
- Stamp Act as to newspapers, 57.
- Stanhope, L., on liberty of press, Preface, xiv.
- State and Church, 371, 372.
- Stationers' Company and Licensing Act of 1662, 45; first charter of, 243; registration of copyright with, 278; of assignment of, 279; registration of copyright in paintings, 315.
- Stations of the cross in churches, 432.
- Statutes, copyright in, 285; right to arrange and digest, 285.
- Stolen property, advertisement for, 59; pretending to find, 368.
- Strangers in Parliament, motion to exclude, 118.
- Street preaching, 549.
- Submission of the clergy, 372.
- Suffragan bishops, 414.
- Sunday, ancient law as to, 352; early English laws as to, 354; fairs and markets on, 355; Puritan views of, 355; election of vestries and corporation officers on, 355; general work and selling goods on, 356; works of one's ordinary calling, 356; bakers' work on Sunday, 356; professional work on, 357; factory work on, 358; one penalty recoverable for work on, 358; leave to prosecute for offences on, 358; travelling on, 358; hackney coaches on, 358; stage coaches and railways on, 359; sports and games on, 359; theatres, killing game and fish on, 359; law courts sitting, and legal business on, 360; bills of exchange on, 361; houses of entertainment and debating societies on, 361; opening public-houses on, 363; *bond fide* travellers, 364.

- Suppression of newspapers, 57.
 Supremacy in church affairs, 374 ; oath of, 376.
 Sureties for good behaviour in case of libel, 148, 212 ; as part of punishment, 226.
 Suspension of clergy, 509.
 Swearing profanely, 364 ; punishment, 365.
 Swift as to criticising government, 74.
- TABLE, on Communion, 478.
 Talfourd on common law copyright, 249.
 Taxes, exemption of clergy from, 487.
 Tenterden, L., on liability of shopkeepers for libels, 160.
 Tenths transferred to Crown, 404.
 Test Act, 521 ; repeal, 526.
 Theatres require license, 308 ; ancient laws as to, 308 ; applauding and hissing at, 310 ; conspiracy to hiss, 311 ; opening on Sunday, 359.
 Thief, calling one a, 164.
 Thought, its chief medium, 10 ; in meetings, 12.
 Thurlow on juries in libel cases, 220.
 Timoleon on free speech, 4.
 Tithes, origin of, 447 ; enforced by legislative power, 448 ; impropriators of, 452 ; common law as to, 453 ; divine right of, 453 ; presumptions as to, 455 ; not assignable in gross, 455 ; classes of, 456 ; great and small, 456 ; difficulties in applying law, 456 ; of houses, 456 ; of wood, bees, apples, 457 ; recovery of, 458 ; mode of setting out and delivery, 458 ; vexatious delivery, 459 ; of milk, 460 ; personal, 461 ; modus substituted for, 461 ; in London, 462 ; commutation rent-charge, 462 ; freehold estate on, 464 ; recovery of tithe rent-charge by distress, 465 ; pensions and Easter dues, 466 ; Quakers, recovery from, 467.
 Title of book, infringement by copying, 290.
 Toleration Act does not affect clergy discipline, 506 ; the ancients on, 516 ; early Christians on, 517 ; statutes of intolerance, 519 ; Test and Corporation Acts, 521 ; the Toleration Act of William III., 521 ; toleration after William III., 524 ; progress of public opinion on, 527.
 Toll, exemption of clergy from, 487.
 Tombstone, inscriptions on, 433.
 Town hall, public meetings in, 22.
 Trade, slandering one in his, 175 ; rival tradesmen slandering each other, 178.
 Trademark, generally, 16 ; object and origin of, 340 ; Lords Cranworth and Westbury on, 340 ; distinguished from patent, 341 ; identifying maker of goods, 341 ; infringement of, 342 ; need not be fraudulent, 342 ; registration of, 343 ; usual characteristics of, 344 ; part of goodwill, 344 ; usually protected by injunction, 344 ; offences as to, 345.
 Trading on Sunday, 356 ; of clergymen, 480.
 Travelling on Sunday, 358 ; *bond fide*, 364.
 Treaties on international copyright, 272.
 Trial, new, in libel cases, 223 ; *see* Jury.
 Trinity, denial of, 64.
 Trusts, for dissenters, 529 ; mode of interpreting, 529 ; length of possession of, 531.
 Truth of libel, not a good defence to indictment, 214.
 Turnips, tithe of, 450, 459.
 Tutchin's libel on the government, 93.
- UNIFORMITY, Statute of, fixed canons and doctrines, 385 ; on ceremonies, 472.
 Union of benefices, 445.
 Unitarians, not chargeable with blasphemy, 64 ; their charities, 530 ; their religion, 536.
 University, copyrights of, 283 ; presenting to, benefices of Papists, 396.
 Unlawful societies and clubs, 24.
 Utility as ingredient of patent, 327.

- VACANCY in benefices, 404; in bishoprics, 413.
- Vestments of clergy, 479.
- Vestry, meeting of, 437; rector or vicar ought to be chairman, 438; discretion as to adjourning, 438.
- Vicars, distinguished from rectors, 451; number of, 452.
- WAFERS, legality of, in communion, 478.
- Walpole, Sir R., on publishing Parliamentary debates, 117.
- Waste and dilapidations in ecclesiastical property, 442.
- Wedderburn on *ex officio* informations, 102; on state of law as to juries in libel cases before Fox's Act, 219.
- Wesley resisting order of bishop, 506.
- Westbury, L., on trademark, 340.
- Westminster Hall, first public meeting in, 20; public meeting within a mile of, 24.
- Wife, libelling husband to, 157; suing for slander on chastity, 174.
- Wikoff on number of sects, Preface, vii.
- Wilkes, public meetings began about, 20; libel on sovereign, 89; number of libels in his time, 103; ordering his libel to be burnt, 229.
- Willes, J., on copyright, 256.
- Witch, calling one a, not now actionable, 166; old acts against, 366; punishment of, 367.
- Witness not liable for slander, 195.
- Woman suing for slander on her morality, 173; on stage, 309; as officers in church, 407.
- Wood, tithe of, 457.
- Words are transient compared with print, 145.
- Work on Sunday, 356.
- Worship, public tendency to, 349; ecclesiastical laws subject to amendment, 350; uniformity in ceremonies of, 472; mode fixed by statute, 473; leading ceremonies in, 476; position of clergyman during, 479; vestments of clergy in, 479; disturbance of, 489, 523.
- Worship, Public, Act, 498.
- Writing and print used in same sense in libel, 144; written and spoken slander, 144.
- Writs and legal business on Sunday, 361.

THE END.

